

25-28
No. 11900

United States
Circuit Court of Appeals
For the Ninth Circuit.

UNITED STATES OF AMERICA,
Appellant.
vs.

MARCELLUS B. HAYES and MARY I. HAYES,
Also Known as Bell Hayes, Husband and Wife;
ADELBERT M. HAYES, and HARNEY
COUNTY, a Municipal Corporation and Po-
litical Subdivision of the State of Oregon,
Appellees,
and

MARCELLUS B. HAYES and MARY I. HAYES,
Also Known as Bell Hayes, Husband and Wife;
and ADELBERT M. HAYES,
Appellants,
vs.

UNITED STATES OF AMERICA,
Appellee.

Transcript of Record

Upon Appeals from the District Court of the United States
for the District of Oregon

FILED
SEP 1 - 1948

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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OF RECORD

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United States Attorney;

LINUS M. FULLER and
BERT C. BOYLAN,

Special Assistants to United States Attorney,
U. S. Court House,
Portland, Oregon,

For Appellant and Appellee, U. S. A.

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EDWIN D. HICKS and
THOMAS H. TONGUE,

Yeon Bldg.,
Portland, Oregon,

For Marcellus B. Hayes, Mary I. Hayes
and Adelbert M. Hayes, Appellees and
Cross-Appellants;

LELAND S. DUNCAN,

Burns, Oregon,

For Harney County, Oregon.

In the District Court of the United States
for the District of Oregon

Civil No. 3124

UNITED STATES OF AMERICA,

Plaintiff,

vs.

BELLE HAYES and MARCELLUS B. HAYES,
Wife and Husband; and HARNEY COUNTY,
a Municipal Corporation and Political Sub-
division of the State of Oregon,

Defendants.

COMPLAINT IN CONDEMNATION

Comes now the plaintiff, the United States of America, by its attorneys, and for cause of action respectfully represents to this Honorable Court as follows:

I.

That this proceeding is instituted in accordance with and under the authority of the following Acts of Congress, to wit:

The Act of August 1, 1888 (25 Stat. 357—
U.S.C. Title 40, Sec. 257);

The Migratory Bird Conservation Act of
February 18, 1929 (45 Stat. 1222-U.S.C. Title
16, Sec. 715) as supplemented and amended;

II.

That pursuant to and under the authority of the Acts of Congress above cited, the Assistant Secre-

tary of the Department of the Interior (1) has selected the hereinafter described lands for acquisition by the United States of America for the purposes of the Migratory Bird Conservation Act of February 18, 1929, above cited, as supplemented and amended, for acquisition within the Malheur National Wildlife Refuge of Oregon, and has determined that such lands are necessary and suitable for the conservation of migratory game birds; (2) has determined and is of the opinion that it is necessary and advantageous to the government of the United States to acquire by condemnation under judicial process the estate or interest hereinafter set forth in and to the lands so selected and hereinafter described for public use in connection with the administration of the Malheur National Wildlife Refuge of Oregon; (3) has requested the Attorney General of the United States to institute this proceeding [1*] to acquire said estate in said lands, in pursuance of which request the Attorney General has directed this proceeding to be instituted;

III.

That the estate taken by the plaintiff in this proceeding for said public use is the fee simple title to the lands hereinafter described, together with all accretions and relictions and all and singular the water rights and other rights, tenements, hereditaments and appurtenances thereunto belonging or in anywise appertaining;

* Page numbering appearing at foot of page of original Reporter's Transcript of Record.

IV.

That the lands, the estate of which is sought, as above set out by this proceeding, are located in Harney County, Oregon, within this judicial district, and are more particularly described as follows, to wit:

Tract 17: Township Twenty-Five (25) South (north of Malheur Lake), Range Thirty-Two (32) East, Willamette Meridian: In section thirty-six (36), lots two (2), three (3) and four (4), Southeast quarter Northwest quarter ($SE\frac{1}{4}NW\frac{1}{4}$), and Northeast quarter Southwest quarter ($NE\frac{1}{4}SW\frac{1}{4}$); and together therewith the attached riparian lands of the bed of Malheur Lake appertaining thereto, and Lake-bed Parcel 48; and

Bounded on the north, in part by land of F. A. Ruh and in part by land of the United States (tract 18); on the east by land of the United States (tract 18); on the south, in part by land of the United States (tract 41), in part by the W. E. Marshall Estate tract (61a) and the center line of Malheur Lake, and in part by the J. E. Graves tract (55a) and a wire fence; and on the west, in part by land of the United States (tract 16) and in part by the J. E. Graves tract (55); containing 1101.68 acres, be the same more or less;

The above-described tract of land is delineated on a map tracing designated M. B. Hayes Tract (17) bearing date of September 19, 1944, of record in the files of the Department of the

Interior. A print from that map tracing is attached hereto marked "Exhibit A" and by reference made a part of this Complaint;

V.

That the public use for which the estate above set out in the lands above described is sought is adequately to provide for an addition to and inclusion within the Malheur National Wildlife Refuge of Oregon, and for other uses incidental thereto under the provisions of the Migratory Bird Conservation Act of February 18, 1929, above cited, as supplemented and amended;

VI.

That funds for the acquisition of said estate in said lands have been authorized and appropriated by the said Migratory Bird Conservation Act of [2] February 18, 1929, above cited, as supplemented and amended;

VII.

That plaintiff has caused diligent search to be made among the public records of the State of Oregon and of Harney County, Oregon, wherein said lands are located, to determine the names of the owners and the names of every other person interested in said lands, or any part thereof, and that all such persons insofar as can be ascertained at this time have been made parties to this proceeding;

VIII.

That the plaintiff has done and performed every act and thing required by law to be done by the

plaintiff as a condition precedent to the bringing and maintaining of this action.

Wherefore, the plaintiff prays that this Court take jurisdiction of the above-entitled proceeding and make and have entered herein such Judgments and Orders as may be necessary to vest in the plaintiff, the United States of America, the estate or interest in and to the lands above described, sought to be acquired by the plaintiff in this proceeding, and to determine the amount of just compensation to be paid by the plaintiff to whomsoever may be adjudged to be the owner or owners of said lands and entitled to such compensation, and to make distribution of such just compensation to the parties entitled thereto as expeditiously as possible.

/s/ HENRY L. HESS,

United States Attorney.

/s/ LINUS M. FULLER,

Special Assistant to the
United States Attorney.

/s/ BERT C. BOYLAN,

Special Assistant to the
United States Attorney.

Attorneys for Plaintiff. [3]

State of Oregon,

County of Multnomah—ss.

I, Linus M. Fuller, being first duly sworn, depose and say:

That I am a duly appointed, qualified and acting Special Assistant to the United States Attorney; that I am possessed of information from which

I have prepared the foregoing Complaint in Condemnation and the allegations therein contained are true as I verily believe.

/s/ LINUS M. FULLER.

Subscribed and sworn to before me this 22nd day of April, 1946.

[Seal] /s/ L. JEANETTE BEAR,
Notary Public for Oregon.

My Commission Expires: 9-23-47.

[Endorsed]: Filed Apr. 22, 1946. [4]

District Court of the United States
for the District of Oregon
Civil Action File No. 3124

UNITED STATES OF AMERICA,
Plaintiff,
vs.

BELLE HAYES and MARCELLUS B. HAYES,
Wife and Husband; and HARNEY COUNTY,
a Municipal Corporation and Political Subdi-
vision of the State of Oregon,
Defendants.

SUMMONS

To the above-named Defendants:

You are hereby summoned and required to appear and defend this action and to serve upon Henry L. Hess, U. S. Attorney; Bert C. Boylan and Linus

M. Fuller, Special Assistants to the U. S. Attorney, plaintiff's attorneys, whose address is U. S. Court House, Portland, Oregon, an answer to the complaint which is herewith served upon you, within twenty days after service of this summons upon you, exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint.

[Seal]

LOWELL MUNDORFF,

Clerk of Court.

By F. L. BUCK,

Chief Deputy Clerk.

Dated: April 22, 1946.

[Endorsed]: Filed Aug. 14, 1946. [5]

Return on Service of Writ

I hereby certify and return, that on the 22nd day of April, 1946, I received the within summons Returned unserved by order Attorney for Plaintiff.

Portland, Oregon, Aug. 13, 1946.

JACK R. CAUFIELD,

United States Marshal.

By MARTIN LAVELLE,

Deputy United States
Marshal.

[Title of District Court and Cause.]

ORDER GRANTING LEAVE TO FILE
AMENDED COMPLAINT IN CONDEM-
NATION

This matter coming on upon the motion of the plaintiff, the United States of America, by and through its attorneys of record herein, and It Appearing to the Court that leave should be granted to the plaintiff to file herein its Amended Complaint in Condemnation on the ground and for the reason set forth in plaintiff's Motion for Leave to File Amended Complaint in Condemnation; Now, Therefore, it is by the Court at this time Considered, Ordered and Adjudged that the plaintiff, the United States of America, be and it is hereby granted leave to file an Amended Complaint in Condemnation herein.

/s/ JAMES ALGER FEE,
District Judge.

Dated at Portland, Oregon, this 13th day of August, 1946.

[Endorsed]: Filed Aug. 13, 1946. [6]

[Title of District Court and Cause.]

AMENDED COMPLAINT IN
CONDEMNATION

Leave of Court having been obtained, the United States of America, by its attorneys, files this, its

Amended Complaint in Condemnation, and respectfully represents to this Honorable Court as follows:

I.

That this proceeding is instituted in accordance with and under the authority of the following Acts of Congress, to wit:

The Act of August 1, 1888 (25 Stat. 357—U.S.C. Title 40, Sec. 257);

The Migratory Bird Conservation Act of February 18, 1929 (45 Stat. 1222—U.S.C. Title 16, Sec. 715) as supplemented and amended;

II.

That pursuant to and under the authority of the Acts of Congress above cited, the Assistant Secretary of the Department of the Interior (1) has selected the hereinafter described lands for acquisition by the United States of America for the purposes of the Migratory Bird Conservation Act of February 18, 1929, above cited, as supplemented and amended, for acquisition within the Malheur National Wildlife Refuge of Oregon, and has determined that such lands are necessary and suitable for the conservation of migratory game birds; (2) has determined and is of the opinion that it is necessary and advantageous to the government of the United States to acquire by condemnation under judicial process the estate or interest hereinafter set forth in and to the lands so selected and hereinafter described for public use in connection with the administration of the Malheur National Wild-

life Refuge of Oregon; (3) has requested the Attorney General of the United States to institute this proceeding to acquire said estate in said lands, [7] in pursuance of which request the Attorney General has directed this proceeding to be instituted;

III.

That the estate taken by the plaintiff in this proceeding for said public use is the fee simple title to the lands hereinafter described, together with all accretions and relictions and all and singular the water rights and other rights, tenements, hereditaments and appurtenances thereunto belonging or in anywise appertaining;

That the lands, the estate of which is sought, as above set out by this proceeding, are located in Harney County, Oregon, within this judicial district, and are more particularly described as follows, to wit:

Tract 17: Township Twenty-Five (25) South (north of Malheur Lake); Range Thirty-Two (32) East, Willamette Meridian: In section thirty-six (36), lots two (2), three (3), and four (4), Southeast quarter Northwest quarter ($SE\frac{1}{4}NW\frac{1}{4}$), and Northeast quarter Southwest quarter ($NE\frac{1}{4}SW\frac{1}{4}$); and in addition thereto the attached lands lying in the bed of Malheur Lake abutting upon the meander line of, and incident to, the riparian lands included in the above-described subdivisions, and other lands in the bed of said lake held by M. B. Hayes under adverse possession, all as par-

ticularly described and adjudicated to said M. B. Hayes by Judgment and Decree, dated October 2, 1944, in the case of the United States vs. Henry Otley et al., Civil No. 1601, in the United States District Court for the District of Oregon; and Lake-bed Parcel 48; and

Bounded on the north, in part by land of F. A. Ruh and in part by land of the United States (tract 18); on the east by land of the United States (tract 18); on the south, in part by land of the United States (tract 41), in part by the W. E. Marshal Estate tract (61a) and the center line of Malheur Lake, and in part by the J. E. Graves tract (55a) and a wire fence; and on the west, in part by land of the United States (tract 16) and in part by the J. E. Graves tract (55); containing 1101.68 acres, be the same more or less;

The above-described tract of land is delineated on a map tracing designated M. B. Hayes Tract (17) bearing date of September 19, 1944, of record in the files of the Department of the Interior. A print from that map tracing is attached hereto marked "Exhibit A" and by reference made a part of this Amended Complaint;

V.

That the public use for which the estate above set out in the lands above described is sought is adequately to provide for an addition to and inclusion within the Malheur National Wildlife Refuge of Oregon, and for other uses incidental thereto under

the provisions of the Migratory Bird Conservation Act of February 18, 1929, above cited, as supplemented and amended; [8]

VI.

That funds for the acquisition of said estate in said lands have been authorized and appropriated by the said Migratory Bird Conservation Act of February 18, 1929, above cited, as supplemented and amended;

VII.

That plaintiff has caused diligent search to be made among the public records of the State of Oregon and of Harney County, Oregon, wherein said lands are located, to determine the names of the owners and the names of every other person interested in said lands, or any part thereof, and that all such persons, insofar as can be ascertained at this time, have been made parties to this proceeding;

VIII.

That the plaintiff has done and performed every act and thing required by law to be done by the plaintiff as a condition precedent to the bringing and maintaining of this action.

Wherefore, the plaintiff prays that this Court take jurisdiction of the above-entitled proceeding and make and have entered herein such Judgments and Orders as may be necessary to vest in the plaintiff, the United States of America, the estate or interest in and to the lands above described, sought to be acquired by the plaintiff in this proceeding, and to determine the amount of just com-

pensation to be paid by the plaintiff to whomsoever may be adjudged to be the owner or owners of said lands and entitled to such compensation, and to make distribution of such just compensation to the parties entitled thereto as expeditiously as possible.

/s/ HENRY L. HESS,

United States Attorney.

/s/ LINUS M. FULLER,

Special Assistant to the

United States Attorney.

/s/ BERT C. BOYLAN,

Special Assistant to the

United States Attorney. [9]

Attorneys for Plaintiff.

State of Oregon,

County of Multnomah—ss.

I, Linus M. Fuller, being first duly sworn, depose and say:

That I am a duly appointed, qualified and acting Special Assistant to the United States Attorney; that I am possessed of information from which I have prepared the foregoing Amended Complaint in Condemnation and the allegations therein contained are true as I verily believe.

/s/ LINUS M. FULLER.

Subscribed and sworn to before me this 13th day of August, 1946.

[Seal] /s/ L. JEANETTE BEAR,

Notary Public for Oregon.

My Commission Expires: 9-23-47.

[Endorsed]: Filed Aug. 13, 1946. [10]

District Court of the United States for the
District of Oregon
Civil Action File No. 3124

UNITED STATES OF AMERICA,

Plaintiff,

vs.

BELLE HAYES and MARCELLUS B. HAYES,
wife and husband; and HARNEY COUNTY,
a municipal corporation and political subdi-
vision of the State of Oregon,

Defendants.

SUMMONS

To the above named defendants:

You are hereby summoned and required to appear and defend this action and to serve upon Henry L. Hess, U. S. Attorney; Bert C. Boylan and Linus M. Fuller, Special Assistants to the U. S. Attorney, plaintiff's attorneys, whose address is U. S. Court House, Portland, Oregon, an answer to the amended complaint which is herewith served upon you, within twenty days after service of this summons upon you, exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint.

[Seal]

LOWELL MUNDORFF,

Clerk of Court.

By J. CASE,

Deputy Clerk.

Date: August 13, 1946.

[Endorsed]: Filed Jan. 2, 1948. [11]

United States of America,
District of Oregon—ss.

I, Jack R. Caufield, U. S. Marshal for Oregon, hereby certify that I served the within summons within the State of Oregon on the 28 day of Aug. 1946, on the within named Belle Hayes, at Burns, Oregon by delivering a copy thereof prepared and certified to by Lowell Mundorff, Clerk of the United States District Court for the District of Oregon, together with a copy of the Amended complaint prepared and certified to by Linus M. Fuller, of attorneys for the Plaintiff, to Belle Hayes personally and in person within the State of Oregon.

Marshal's Docket 11688

Civil Docket 3124

JACK R. CAUFIELD,
United States Marshal.
FRANK L. MEYER,
Deputy U. S. Marshal.

United States of America,
District of Oregon—ss.

I, Jack R. Caufield, U. S. Marshal for Oregon, hereby certify that I served the within summons within the State of Oregon on the 28th day of Aug. 1946, on the within named Marcellas B. Hayes, at Burns, Oregon by delivering a copy thereof prepared and certified to by Lowell Mundorff, Clerk of the United States Court for the District of Oregon, together with a copy of the Amended Complaint prepared and certified to by Linus M. Fuller, of attorneys for the Plaintiff, to Marcellas B. Hayes

personally and in person within the State of Oregon.

Marshal's Docket 11688

Civil Docket 3124

JACK R. CAUFIELD,

United States Marshal.

FRANK L. MEYER,

Deputy U. S. Marshal.

United States of America,

District of Oregon—ss.

United States of America,

I, Jack R. Caufield, U. S. Marshal for Oregon, hereby certify that I served the within summons within the State of Oregon on the 28 day of Aug. 1946, on the within named Harney County by Leland Duncan Dist. Atty. at Burns, Oregon by delivering a copy thereof prepared and certified to by Lowell Mundorff, Clerk of the United States District Court for the District of Oregon, together with a copy of the Amended complaint prepared and certified to by Linus M. Fuller, of attorneys for the Plaintiff, to Harney County by Leland Duncan Dist. Atty. personally and in person within the State of Oregon.

Marshal's Docket 11688

Civil Docket 3124

JACK R. CAUFIELD,

United States Marshal.

FRANK L. MEYER,

Deputy U. S. Marshal.

United States of America

District of Oregon—ss.

I, Jack R. Caufield, U. S. Marshal for Oregon, hereby certify that I served the within summons within the State of Oregon on the 28 day of Aug. 1946, on the within named Harney County by William A. Carroll, Co. Clerk at Burns, Oregon, by delivering a copy thereof prepared and certified to by Lowell Mundorff, Clerk of the United States District Court for the District of Oregon, together with a copy of the Amended complaint and certified to by Linus M. Fuller, of attorneys for the Plaintiff, to Harney County by William A. Carroll personally and in person within the State of Oregon.

Marshal's Docket 11688

Civil Docket 3124

JACK R. CAUFIELD,

United States Marshal.

FRANK L. MEYER,

Deputy U. S. Marshal.

[Title of District Court and Cause.]

**ANSWER OF BELL HAYES AND
MARCELLUS B. HAYES**

Come now Bell Hayes and Marcellus B. Hayes, the above named defendants, and for answer to the amended complaint herein deny each and all allegation of said amended complaint, except as admitted and alleged in the further and separate answer of these defendants.

Further and separate answer of defendants Bell Hayes and Marcellus B. Hays.

For a further and separate answer to the amended complaint in this cause Bell Hayes and Marcellus B. Hayes allege as follows:

I.

That the defendants Bell Hayes and Marcellus B. Hayes are now and for the past forty years have been the sole and exclusive owners of the 1101.68 acres of land particularly described in plaintiff's amended complaint.

II.

That the said lands of these defendants border upon or lie within the lake bed of Malheur Lake. That said Malheur Lake is a low depression or area $16\frac{2}{3}$ miles long and from two to eight miles wide. That said area is usually covered with water in the spring of the year, but that due to drainage and evaporation the waters recede from the lands of these defendants during the growing season of each year, and said lands can be and are used each year for agricultural purposes. The soil of all of said lands is deep and extremely fertile [14] and when defendants' said lands are suitable for agricultural crops, large crops of grass, hay, grain and other crops, can be and are produced on said lands. The water condition of Malheur Lake varies from year to year, depending upon the variation of the spring runoff from rains and melting snows. From the year 1923 to the year 1941, grain and other agricultural crops could be, and were produced on a large part of the said lands of these defendants each year, except when such production was prevented by the

Plaintiff herein. The lake bed of Malheur Lake was completely dry in the summers of 1932 and 1934. From the year 1941 to date, most of the lands of these defendants, due to an excessive amount of water, have not been suitable for agricultural crops except grass and hay.

III.

That in addition to the agricultural values of defendants' said lands, said lands are valuable for the following reasons: Malheur Lake is and for many years has been a noted place for ducks, geese and other water fowl because such lands produce an abundance of foods for such water fowl. It has been estimated by government agents that more than one million ducks and other water fowl visit and feed upon said lake during the hunting season each year. That for many years the United States Government, through its bureaus and departments, has been acquiring, securing and reserving lands in Harney County, Oregon, to be used as, and which are used as a Bird Refuge; that no hunting is allowed on said Bird Refuge, and the public is excluded therefrom; that said Bird Refuge now consists of an area of more than One Hundred and Twenty-Five Thousand acres of land in and about Malheur Lake, Harney Lake and Blitzen Valley. That said Bird Refuge includes substantially all the lands in that part of the State of Oregon near, or served by water; that the boundary line of said Bird Refuge is more than 170 miles long, and with very few exceptions is now fenced, and numerous

trespass notices displayed thereon, and guards and wardens patrol said lands to prevent hunting thereon. [15]

IV.

That the said land of these defendants is not now and never has been a part of said or any bird refuge; That thousands of ducks, geese and other water fowl, each year use, and feed upon the said lands of the defendants during the hunting season, and by reason of the facts heretofore stated said lands of defendants are valuable for hunting purposes.

V.

The lands of said defendants have a further value for the production of muskrats. For many years the Malheur Lake region has been famous for the production of muskrat pelts. It is claimed by some residents of the area that the lands of the lake bed when properly handled, produce a greater revenue from muskrat pelts, than from any other purpose.

VI.

These defendants allege that the fair and reasonable value of the lands described in plaintiff's amended complaint for all purposes is not less than Fifty Dollars (\$50.00) per acre, or the sum of Fifty-Five Thousand and Eighty-Four Dollars (\$55,084.00).

Wherefore, these defendants pray that this court find and determine that these defendants are the sole and exclusive owners of the lands described in plaintiff's amended complaint; that the Court find

and determine that the value of said lands is Fifty-Five Thousand and Eighty-Four Dollars (\$55,084.00), and that these defendants have judgment against the plaintiff for said amount,

J. W. McCULLOCH,
EDWIN D. HICKS,
THOMAS H. TONGUE, III,
Attorneys for Defendants.

State of Oregon,
County of Multnomah—ss.

I, Edwin D. Hicks, being first duly sworn, depose and say that I am one of the attorneys for defendants in the above entitled cause; and that the foregoing answer is true, as I verily believe.

EDWIN D. HICKS,

Subscribed and sworn to before me this 2d day of October, 1946.

/s/ THOMAS H. TONGUE, III,

[Notarial Seal]

Notary Public for the State of Oregon.

My Commission Expires 8/25/48.

State of Oregon,
County of Multnomah—ss.

Due service of the within Answer is hereby accepted in Multnomah County, Oregon this 2 day of October, 19....., be receiving a copy thereof, duly certified to as such by....., of Attorneys for

BERT C. BOYLAN,
Attorney for Plaintiff.

[Endorsed] Filed October 2, 1946. [17]

In the District Court of the United States for the
District of Oregon

No. 3124

UNITED STATES OF AMERICA,

Petitioner,

vs.

1,101.68 ACRES, more or less, of land situate in
Harney County, Oregon,

Defendant.

In the matter of the acquisition by the United States of America of certain land situate, lying and being in connection with the Malheur National Wildlife Refuge of the Fish and Wildlife Service, United States Department of the Interior.

DECLARATION OF TAKING

I, C. Girard Davidson, Assistant Secretary of the Interior of the United States, acting in such capacity, do hereby make and cause to be filed this Declaration of Taking under and in accordance with the act of February 26, 1931 (46 Stat. 1421; 40 U. S. C. 258a), and declare that:

First: (a) the land hereinafter described is taken pursuant to and under authority of the Migratory Bird Conservation Act of February 18, 1929 (45 Stat. 1222), as supplemented and amended.

(b) The said land has been selected by me for acquisition by the United States for use in connection with the Malheur National Wildlife Refuge, Fish

and Wildlife Service, Department of the Interior, and immediate control thereof is required. [18]

(c) In my opinion, it is necessary, advantageous, and in the interest of the United States that said land be acquired by judicial proceedings as authorized by the act of August 1, 1888 (25 Stat. 357; 40 U. S. C. 257, 258), as supplemented and amended.

(d) The land is necessary for use in carrying out the purposes of the Migratory Bird Conversation Act of February 18, 1929 (45 Stat. 1222), as supplemented and amended, including the establishment and administration of the Malheur National Wildlife Refuge.

Second: Pursuant to law, I have selected for acquisition for the purposes of the foregoing acts the following described land:

Tract No. 17

Township Twenty-Five (25) South (north of Malheur Lake), Range Thirty-Two (32) East, Willamette Meridian: In section thirty-six (36), lots two (2), three (3) and four (4), Southeast quarter Northwest quarter ($SE\frac{1}{4}NW\frac{1}{4}$), and Northeast quarter Southwest quarter ($NE\frac{1}{4}SW\frac{1}{4}$); and in addition thereto the attached lands lying in the bed of Malheur Lake abutting upon the meander line of, and incident to, the riparian lands included in the above-described subdivisions, and other lands in the bed of said lake held by M. B. Hayes under adverse possession (Lake-bed Parcel 48), all as particularly described and adjudicated to said M. B. Hayes by Judgment and

Decree, dated October 2, 1944, in the case of the United States vs. Henry Otley et al., Civil No. 1601, in the United States District Court for the District of Oregon; and

Bounded on the north, in part by land of F. A. Ruh and in part by land of the United States (tract 18); on the east by land of the United States (tract 18); on the south, in part by land of the United States (tract 41), in part by the W. E. Marshall Estate tract (61a) and the center line of Malheur Lake, and in part by the J. E. Graves tract (55a) and a wire fence; and on the west, in part by land of the United States (tract 16) and in part by the J. E. Graves tract (55); containing 1,101.68 acres, be the same more or less.

The above-described area, containing in the aggregate 1,101.68 acres, more or less, is delineated on a map tracing designated M. B. Hayes Tract (17) bearing date of September 19, 1944, and on file in the Department of [19] the Interior, and prints from this tracing are attached hereto and made part hereof. Said area is to be acquired together with all accretioned land, and all and singular water and riparian rights and other rights, tenements, hereditaments and appurtenances thereunto belonging or in any wise appertaining.

Third: The estate taken for public use is the full fee simple title, reserving the right to use in livestock ranching operations, such as harvesting of hay and feeding and grazing of stock, the surveyed land and Special Master Tract 48 in the bed

of Malheur Lake for a period of five (5) years from October 9, 1946, in accordance with rules and regulations of the Secretary of the Interior.

Fourth: The sum estimated by me as just compensation for said land with all buildings and improvements thereon and all appurtenances thereunto belonging including any and all interest whatsoever is Sixteen Thousand Dollars (\$16,000.00), which sum is being deposited in the Registry of this Court for the use and benefit of the parties entitled thereto. I am of the opinion that the ultimate award for said land will probably be within the limits of allocations and allotments made and provided for the purchase of said land.

In Witness Whereof, I have signed this Declaration of Taking and caused the seal of the Department of the Interior to be hereto affixed on this 14 day of January A.D., 1947, in the city of Washington District of Columbia.

[Seal] /s/ C. GIRARD DAVIDSON,
Assistant Secretary of the Interior of the United
States of America.

[Endorsed]: Filed February 11, 1947. [20]

[Title of District Court and Cause.]

ORDER GRANTING LEAVE TO FILE SECOND AMENDED COMPLAINT IN CONDEMNATION

This matter coming on for consideration on the motion of the plaintiff, through its attorneys of

record, and It Appearing proper and necessary that the plaintiff be granted leave to file herein its Second Amended Complaint in Condemnation for the purpose of alleging the filing of a Declaration of Taking and the deposit of the estimated just compensation for the taking of the lands described in the amended complaint in condemnation; Now, Therefore, it is Ordered that the plaintiff be and it is hereby granted leave to file its Second Amended Complaint in Condemnation.

/s/ CLAUDE McCOLLOCH,
District Judge.

Dated at Portland, Oregon, this 13th day of February, 1947.

[Endorsed]: Filed February 13, 1947. [21]

[Title of District Court and Cause.]

SECOND AMENDED COMPLAINT
IN CONDEMNATION

Leave of Court having been obtained, the plaintiff, the United States of America, by its attorneys, files this Second Amended Complaint in Condemnation and respectfully represents to this Honorable Court as follows:

I.

That this proceeding is instituted in accordance with and under the authority of the following Acts of Congress, to wit:

The Act of August 1, 1888 (25 Stat. 357—

U.S.C. Title 40, Sec. 257, 258), as supplemented and amended;

The Migratory Bird Conservation Act of February 18, 1929 (45 Stat. 1222—U.S.C. Title 16, Sec. 715) as supplemented and amended;

The Act of February 26, 1931 (46 Stat. 1421—40 U.S.C. Sec. 258a);

II.

That pursuant to and under the authority of the Acts of Congress above cited, the Assistant Secretary of the Department of the Interior of the United States (1) has selected the hereinafter described lands for acquisition by the United States of America for the purposes of the Migratory Bird Conservation Act of February 18, 1929, above cited, as supplemented and amended, for inclusion within the Malheur National Wildlife Refuge of Oregon, and has determined that such lands are necessary and suitable for the conservation of migratory game birds; (2) has determined and if of the opinion that it is necessary, advantageous and in the interest of the United States to acquire by condemnation under judicial process the estate or interest hereinafter set forth in and to the lands so selected and hereinafter described for public use in connection with the administration of the Malheur National Wildlife Refuge of Oregon; (3) has requested the Attorney [22] General of the United States to institute this proceeding to acquire said estate in said lands, in pursuance of which request the Attorney General has directed this proceeding to be instituted;

III.

That the estate taken by the plaintiff in this proceeding for said public use is the full fee simple title to the lands hereinafter described, reserving the right to use in livestock ranching operations, such as harvesting of hay and feeding and grazing of stock, the surveyed land and Special Master Tract 48 in the bed of Malheur Lake for a period of five years from October 9, 1946, in accordance with rules and regulations of the Secretary of the Interior;

IV.

That the lands, the estate of which is sought in this proceeding, as above set out, are located in Harney County, Oregon, within this judicial district, and are more particularly described as follows, to wit:

Tract No. 17: Township Twenty-Five (25) South (north of Malheur Lake), Range Thirty-Two (32) East, Willamette Meridian: In section thirty-six (36), lots two (2), three (3) and four (4), Southeast quarter Northwest quarter ($SE\frac{1}{4}NW\frac{1}{4}$), and Northeast quarter Southwest quarter ($NE\frac{1}{4}SW\frac{1}{4}$); and in addition thereto the attached lands lying in the bed of Malheur Lake abutting upon the meander line of, and incident to, the riparian lands included in the above-described subdivisions, and other lands in the bed of said lake held by M. B. Hayes under adverse possession (Lake-bed Parcel 48), all as particularly described and

adjudicated to said M. B. Hayes by Judgment and Decree, dated October 2, 1944, in the case of the United States vs. Henry Otley et al, Civil No. 1601, in the United States District Court for the District of Oregon; and

Bounded on the north, in part by land of F. A. Ruh and in part by land of the United States (tract 18); on the east by land of the United States (tract 18); on the south, in part by land of the United States (tract 41), in part by the W. E. Marshall Estate tract (61a) and the center line of Malheur Lake, and in part by the J. E. Graves tract (55a) and a wire fence; and on the west, in part by land of the United States (tract 16) and in part by the J. E. Graves tract (55); containing 1,101.68 acres, be the same more or less.

The above-described tract of land is delineated on a map tracing designated M. B. Hayes Tract (17) bearing date of September 19, 1944, and on file in the Department of the Interior. A print from that map tracing is attached hereto marked "Exhibit A" and by reference made a part of this Second Amended Complaint;

V.

That the public use for which the estate above set out in the lands above described is sought is adequately to provide for an addition to and inclusion within the Malheur National Wildlife Refuge of Oregon and for other uses incidental [23] thereto

under the provisions of the Migratory Bird Conservation Act of February 18, 1929, above cited, as supplemented and amended;

VI.

That funds for the acquisition of said estate in said lands have been authorized and appropriated by the said Migratory Bird Conservation Act of February 18, 1929, above cited, as supplemented and amended;

VII.

That plaintiff has caused diligent search to be made among the public records of the State of Oregon and of Harney County, Oregon, wherein said lands are located, to determine the names of the owners and the names of every other person interested in said lands or any part thereof, and that all such persons insofar as can be ascertained at this time have been made parties to this proceeding;

VIII.

That the plaintiff has done and performed every act and thing required by law to be done by the plaintiff as a condition precedent to the bringing and maintaining of this action;

IX.

That on the 11th day of February, 1947 a Declaration of Taking was filed in this Court for the taking of the estate above set out in the lands above-described, that in said Declaration of Taking the Assistant Secretary of the Department of the Interior estimated the sum of \$16,000.00 to be just

compensation for the taking of said estate in said lands and that said sum of \$16,000.00 was on the said 11th day of February, 1947 deposited in the Registry of this Court under the provisions of the Declaration of Taking Act of February 26, 1931, heretofore cited.

Wherefore, plaintiff prays:

(a) That this Court make and enter an Order reciting the filing of the Declaration of Taking and the Second Amended Complaint in Condemnation herein and the payment into the Registry of this Court of the estimated just compensation for the taking of the estate hereinbefore set out in the lands hereinbefore described, and the effect thereof as to the vesting of the title thereto in the United States of America; [24]

(b) That this Court take jurisdiction of this cause and make and have entered all such further Orders, Judgments and Decrees as may be necessary to determine the ownership of the hereinbefore described lands and the persons entitled to receive such just compensation, and to fix the amount of such just compensation to be paid by the plaintiff to whomsoever may be adjudged to be entitled thereto, and to make and have entered herein all such further Orders, Judgments and Decrees as may be necessary to vest in the United States of America the title to the estate or interest hereinbefore set out in the lands hereinbefore described, and to make just distribution of the estimated and final

award among those entitled thereto as expeditiously as possible.

/s/ HENRY L. HESS,
United States Attorney

/s/ LINUS M. FULLER,
Special Assistant to the
United States Attorney.

/s/ BERT C. BOYLAN,
Special Assistant to the
United States Attorney.

Attorneys for Plaintiff, P. O. Address: 507 U. S.
Courthouse, Portland 5, Oregon.

State of Oregon,
County of Multnomah—ss.

I, Linus M. Fuller, being first duly sworn, depose
and say:

That I am a duly appointed, qualified and acting
Special Assistant to the United States Attorney;
that I am possessed of information from which I
have prepared the foregoing Second Amended Com-
plaint in Condemnation and the allegations therein
contained are true as I verily believe.

/s/ LINUS M. FULLER.

Subscribed and sworn to before me this 13th day
of February, 1947.

[Seal] /s/ L. JEANETTE BEAR,
Notary Public for Oregon.

My Commission Expires: 9-23-47.

[Exhibit A is identical with Government's Ex-
hibit No. 1, except for colored portions thereof,
set forth at page 87]

[Endorsed]: Filed February 13, 1947. [25]

District Court of the United States
for the District of Oregon

Civil Action File No. 3124

UNITED STATES OF AMERICA,

Plaintiff,

vs.

MARCELLUS B. HAYES and MARY I. HAYES,
also known as BELL HAYES, husband and
wife; ADELBERT M. HAYES, single; and
HARNEY COUNTY, a municipal corporation
and political subdivision of the State of Oregon,
Defendants.

SUMMONS

To the above named Defendants Adelbert M. Hayes
and Harney County, Oregon.

You are hereby summoned and required to appear
and defend this action and to serve upon Henry L.
Hess, U. S. Attorney; Linus M. Fuller and Bert C.
Boylan, Special Assistants to the U. S. Attorney,
plaintiff's attorneys, whose address is U. S. Court
House, Portland, Oregon, an answer to the second
amended complaint which is herewith served upon
you, within twenty days after service of this sum-
mons upon you, exclusive of the day of service. If
you fail to do so, judgment by default will be taken

against you for the relief demanded in the complaint.

[Seal]

LOWELL MUNDORFF,

Clerk of Court.

By /s/ F. L. BUCK,

Chief Deputy Clerk.

Date: February 15, 1947.

[Endorsed]: Filed January 2, 1948. [27]

United States of America,

District of Oregon—ss.

I, Jack R. Caufield, U. S. Marshal for Oregon, hereby certify that I served the within summons within the State of Oregon on the 20th day of March, 1947, on the within named Adelbert M. Hayes at Burns, Oregon by delivering a copy thereof prepared and certified to by Lowell Mundorff, Clerk of the United States District Court for the District of Oregon, together with a copy of the 2nd amended complaint prepared and certified to by Bert C. Boylan, of attorneys for the Plaintiff, to Adelbert M. Hayes personally and in person within the State of Oregon.

Marshal's Docket 11688.

Civil Docket 3124.

JACK R. CAUFIELD,

United States Marshal.

LEO McLAIN,

Deputy U. S. Marshal.

[Title of District Court and Cause.]

JUDGMENT ON DECLARATION OF TAKING
AND ORDER GRANTING IMMEDIATE
POSSESSION

This matter coming on for consideration on the motion of the plaintiff, the United States of America, by and through its attorneys of record, for a Judgment on the Declaration of Taking filed in the above-entitled cause on the 11th day of February, 1947, and for an Order Granting Possession under said Declaration of Taking of the lands therein described and hereinafter described, and a hearing having been had in Open Court on such motion and evidence having been introduced before the Court and the Court having considered the Declaration of Taking and the Second Amended Complaint in Condemnation and the evidence submitted, finds: First: That the United States of America is entitled to acquire the lands hereinafter described for the uses and purposes set forth in said Declaration of Taking and in said Second Amended Complaint in Condemnation; Second: That this proceeding was instituted and said Complaint in Condemnation and said Declaration of Taking were filed herein at the request of the Assistant Secretary of the Department of the Interior of the United States, the authority empowered by law to acquire the lands described in said Second Amended Complaint in Condemnation and Declaration of Taking and hereinafter described, and at the direction of the Attorney General of the United States, the person authorized by law to direct the institution of such pro-

ceedings; Third: That the said Declaration of Taking was filed herein on the 11th day of February, 1947 and simultaneously therewith the sum of \$16,000.00 was deposited in the Registry of this Court in this cause as the estimated just compensation to be paid for the taking of the full fee simple title to the lands hereinafter described, reserving the right to use in livestock [28] ranching operations, such as harvesting of hay and feeding and grazing of stock, the surveyed land and Special Master Tract 48 in the bed of Malheur Lake for a period of five years from October 9, 1946, in accordance with rules and regulations of the Secretary of the Interior; and further, said Declaration of Taking contains (1) a statement of the authority under which and the public use for which said estate in said lands is taken, (2) a description of the lands taken sufficient for the identification thereof, (3) a statement of the estate taken in said lands for said public use, (4) a plan showing the lands taken, (5) a statement of the sum of money estimated by the Assistant Secretary of the Department of the Interior as just compensation for the taking of said estate in said lands, and (6) a statement by the Assistant Secretary of the Department of the Interior that in his opinion the ultimate award to be paid for the taking of said estate in said lands will probably be within any limits prescribed by law to be paid as the price therefor; Now, Therefore, it is hereby Ordered, Adjudged and Decreed: I. That the full fee simple title, reserving the right to use in livestock ranching operations, such as harvesting of hay and feeding and grazing of stock, the sur-

veyed land and Special Master Tract 48 in the bed of Malheur Lake for a period of five years from October 9, 1946, in accordance with rules and regulations of the Secretary of the Interior, in and to the lands described in the Second Amended Complaint in Condemnation and Declaration of Taking on file herein, said lands being hereinafter described, became and was vested in the United States of America on the 11th day of February, 1947, the date of the filing of said Declaration of Taking herein and the depositing into the Registry of this Court in this cause of the amount of the estimated just compensation, free and discharged of all liens and claims of every kind whatsoever; II. That on said date, February 11, 1947, the right to receive said just compensation for the taking of the said estate in said lands vested in the persons entitled thereto and that the amount of said just compensation shall be ascertained and warded in this proceeding as established by Judgment herein pursuant to law; III. That the lands in and to which the estate hereinabove set forth is taken herein are located in Harney County, Oregon, within this judicial district, and more particularly described as follows, to wit: [29]

Tract No. 17: Township Twenty-five (25) South (north of Malheur Lake, Range Thirty-two (32) East, Willamette Meridian: In section thirty-six (36), lots two (2), three (3) and four (4), Southeast quarter Northwest quarter ($SE\frac{1}{4}NW\frac{1}{4}$), and Northeast quarter Southwest quarter ($NE\frac{1}{4}SW\frac{1}{4}$); and in addition thereto the attached lands lying in the bed of Malheur Lake abutting upon the meander line

of, and incident to, the riparian lands included in the above-described subdivisions, and other lands in the bed of said lake held by M. B. Hayes under adverse possession (Lake-bed Parcel 48), all as particularly described and adjudicated to said M. B. Hayes by Judgment and Decree, dated October 2, 1944, in the case of the United States vs. Henry Otley et al., Civil No. 1601, in the United States District Court for the District of Oregon; and

Bounded on the north, in part by land of F. A. Ruh and in part by land of the United States (tract 18); on the east by land of the United States (tract 18); on the south, in part by land of the United States (tract 41), in part by the W. E. Marshall Estate tract (61a) and the center line of Malheur Lake, and in part by the J. E. Graves tract (55a) and a wire fence; and on the west, in part by land of the United States (tract 16) and in part by the J. E. Graves tract (55); containing 1,101.68 acres, be the same more or less;

IV. That possession of the above-described lands under said Declaration of Taking be and is hereby granted to the United States of America as of the date of this Judgment.

/s/ CLAUDE McCOLLOCH,
District Judge.

Dated at Portland, Oregon, this 26th day of February, 1947.

Entered in docket Feb. 26, 1947.

[Endorsed]: Filed February 26, 1947. [30]

[Title of District Court and Cause.]

REPLY TO ANSWER OF DEFENDANTS
BELL HAYES AND MARCELLUS B. HAYES

Comes now the plaintiff, United States of America, by its attorneys of record and by way of reply to the Further and Separate Answer of the defendants Bell Hayes and Marcellus B. Hayes on file herein admits, denies and alleges as follows, to wit:

I.

Plaintiff alleges that it does not have sufficient information to form a belief as to the truth of the allegations set out in Paragraph I of said Further and Separate Answer and therefore neither admits nor denies the same.

II.

Plaintiff admits the geographical and historical data contained in Paragraph II of said Further and Separate Answer, but denies that said lands under condemnation are suitable for or adapted to the growing of agricultural crops and have produced such crops other than forage and wild hay.

III.

Plaintiff admits the allegations of Paragraph III of said Further and Separate Answer, but denies that the public is excluded from said lands.

IV.

Plaintiff admits that every year large numbers of ducks, geese and other water fowl use and feed upon the lands contained within the Malheur Na-

tional Wildlife Refuge, including the lands under condemnation herein but denies each and every other allegation contained in Paragraph IV of said Further and Separate Answer and particularly denies that the lands of the defendants under condemnation [31] herein are valuable for hunting purposes for the reason that the said lands under condemnation herein are within the Malheur National Wildlife Refuge and have been in such Refuge for many years past and that the hunting of migratory wild fowl is unlawful within such Refuge.

V.

Plaintiff denies the allegations of Paragraph V of said Further and Separate Answer.

VI.

Plaintiff denies the allegations of Paragraph VI of the Further and Separate Answer and particularly denies that the lands under condemnation herein are worth the sum of \$50.00 per acre or the total sum of \$55,084.00, or any other sum in excess of \$16,000.00.

And for its Further and Separate Reply to the Further and Separate Answer of the defendants Bell Hayes and Marcellus B. Hayes, the plaintiff alleges as follows, to wit:

I.

That the said answering defendants and each of them are estopped and ought not be admitted to say that at the time of the taking the fair market value of the lands under condemnation was the sum of

\$55,084.00 or any other sum other than the sum of \$16,000.00 for the reason that on the 9th day of October, 1946, for a valuable consideration, the said defendants and each of them, together with the defendant, Adelbert M. Hayes, as owners of said lands made, executed and delivered to the plaintiff, acting through the Department of the Interior, Fish and Wildlife Service, their certain offer or option in writing and subscribed and acknowledged by each of said defendants and designated "Agreement for Acquisition of Lands"; that said option by its terms provided that the said defendants as owners agreed to sell to the plaintiff the 1101.68 acres of land under condemnation herein at and for the agreed and stipulated price of \$16,000.00, reserving to themselves the right to use in livestock ranching operations such as harvesting of hay and feeding and grazing of stock the surveyed land and Special [32] Master Tract 48 in the bed of Malheur Lake for a period of five years from the date of said agreement in accordance with rules and regulations of the Secretary of the Interior; that the said option by its terms provided further that title to the said lands will be acquired by the United States by judicial proceedings to procure a safe title and that the compensation to be claimed by the said owners and the award to be made and paid for said lands in said proceedings shall be upon the basis of the purchase price and reservation provided in said option; that the said option by its terms further provided that the said defendants thereby granted to the plaintiff the option and right to enter into said agreement

for the acquisition of said land within three months from the execution thereof by the vendors and to institute judicial proceedings for the acquisition of the lands as therein provided.

II.

That pursuant to the terms of said option and within three months from the date of the execution thereof by the vendors, the plaintiff, acting through the Secretary of the Interior by the Acting Director, Fish and Wildlife Service, did, on the 16th day of December, 1946, accept the said option and executed the said Agreement for Acquisition of Lands, and did, on said day by the said Acting Director, notify the vendors of said acceptance by mailing a notice of said acceptance to Mr. Marcellus B. Hayes, Box 368, Burns, Oregon, and to Mr. Adelbert M. Hayes, Box 368, Burns, Oregon; a copy of said Agreement for Acquisition of Lands, including the acceptance thereof by the plaintiff, is attached hereto, marked Exhibit A, and by reference made a part of this Further and Separate Reply.

III.

That pursuant to the terms of said Agreement for Acquisition of Lands, and relying upon the acts and agreements of said defendants as set forth in said Agreement for Acquisition of Lands, plaintiff, on the 11th day of February 1947 filed in this proceeding for the condemnation of said lands its Declaration of Taking of said lands, reserving to said defendants the right to use in livestock ranching operations,

such as harvesting of hay and feeding and grazing of stock, the surveyed land and Special Master Tract 48 in the bed of Malheur Lake for a period of five years from October 1946 in accordance with rules and regulations [33] of the Secretary of the Interior, and simultaneously therewith deposited in the Registry of this Court the sum of \$16,000.00, the purchase price as set out in said Agreement as just compensation for the taking of said lands, subject to said reservation, under the provisions of the Declaration of Taking Act of Congress, for the use and benefit of the persons entitled thereto.

Wherefore plaintiff respectfully moves the Court for a judgment herein in accordance with the prayer of the plaintiff in its Second Amended Complaint in Condemnation herein and for an Order Fixing the Value of the lands under condemnation herein and the just compensation to be paid for the taking thereof in the sum of \$16,000.00 in accordance with the said Agreement for Acquisition of Lands.

HENRY L. HESS,

United States Attorney.

/s/ LINUS M. FULLER,

Special Assistant to United
States Atty.

/s/ BERT C. BOYLAN,

Special Assistant to United
States Atty.

Attorneys for Plaintiff, P. O. Address: 507 U. S.
Court House, Portland 5, Oregon.

State of Oregon,
County of Multnomah—ss.

I, Linus M. Fuller, being first duly sworn, depose
and say:

That I am a duly appointed, qualified and acting
Special Assistant to the United States Attorney;
that I am possessed of information from which I
have prepared the foregoing Reply and the allega-
tions therein contained are true as I verily believe.

/s/ LINUS M. FULLER.

Subscribed and sworn to before me this 11th day
of September, 1947.

[Seal] /s/ BERT C. BOYLAN,
Notary Public for State of
Oregon.

My Commission Expires May 2, 1949.

State of Oregon,
County of Multnomah—ss.

Due service of the within Reply is hereby ac-
cepted in Multnomah County this 11th day of Sep-
tember, 1947, by receiving a copy thereof duly cer-
tified to as such by Linus M. Fuller, of Attorneys
for Plaintiff.

/s/ EDWIN D. HICKS,
of Counsel.

[Endorsed]: Filed September 11, 1947. [34]

EXHIBIT A

United States Department of the Interior
Fish and Wildlife ServiceState Oregon,
County Harney

Agreement for Acquisition of Lands

Unit Name: Malheur National Wildlife Refuge.

Tract Name: M. B. Hayes.

Tract Number: 17.

Offer Dated.....October 9, 1946

Offer Expires.....January 9, 1947

M.B.C.C. Approved.....Sept. 29, 1944

Offer Accepted.....Dec. 16, 1946

Acreage1101.68

Price per tract.....\$16,000.00 with reservation

Location: Willamette Meridian, T. 25 S., R. 32 E.,
N. M. L.

Easements, Reservations, and Exceptions: Reserve the right to use in livestock ranching operations, such as harvesting of hay and feeding and grazing of stock, the surveyed land and Special Master Tract 48 in the bed of Malheur Lake for a period of five (5) years from the date hereof in accordance with rules and regulations of the Secretary of the Interior.

/s/ A. M. H.

/s/ M. B. H.

/s/ M. T. H.

United States Department of the Interior
Office of the Secretary

Agreement for the Acquisition of Lands

This Agreement, made and entered into this 9th day of October one thousand nine hundred and forty-six by and between Marcellus B. Hayes, Mary I. Hayes, also known as Bell Hayes, and Adelbert M. Hayes, a divorced person, all of Burns, Oregon, Box 368, hereinafter styled the vendors, for themselves, their heirs, executors, administrators, successors, and assigns, and the United States of America.

Witnesseth:

In consideration of One Dollar (\$1.00) in hand paid by the United States, the receipt of which is hereby acknowledged, and in consideration of the covenants and agreements herein recited, the vendors agree to the acquisition by the United States upon the terms and conditions hereinafter set forth, of the lands, tenements, and hereditaments, together with all the rights, easements, and appurtenances thereunto and situate and lying in Harney Basin north of Malheur Lake, in the County of Harney, State of Oregon, containing 1101.68 acres, more or less, and particularly described as follows:

Willamette Meridian:

T. 25 S., R. 32E., N.M.L.:

Sec. 36, Lots 2, 3, and 4, SE $\frac{1}{4}$ NW $\frac{1}{4}$ and NE $\frac{1}{4}$ SW $\frac{1}{4}$; and in addition thereto the attached lands lying in the bed of Malheur Lake abutting upon the meander line of, and incident to, the

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riparian lands included in the above described subdivisions; and other lands in the bed of said lake held by M. B. Hayes under adverse possession; all as particularly described and adjudicated to said M. B. Hayes by Judgment and Decree, dated October 2, 1944, in the case of the United States vs. Henry Otley et al, Civil No. 1601, in the United States District Court, for the District of Oregon.

The above described lands in one tract is delineated on map tracing designated: M. B. Hayes Tract (17)—bearing date of September 19, 1944, of record in the files of the Department of the Interior. Prints from this map tracing is attached hereto, and, for the purpose of identification, made a part hereof.

The said lands are subject to the following easements, none.

1. The price at which acquisition of the vendors' interest in said lands will be made by the United States shall be at the rate of \$16,000.00 for the tract for the fee simple title thereto*, subject to existing easements for public roads and public utilities, and if the vendors' interest in said lands is less than a fee, then in that event the rate per acre to be paid

*Subject to the reservation of the right to use in livestock ranching operations, such as harvesting of hay and feeding and grazing of stock, the surveyed land and Special Master Tract 48 in the bed of Malheur Lake for a period of five (5) years from the date hereof in accordance with rules and regulations of the Secretary of the Interior and

/s/ A.M.H.

/s/ M.B.H.

/s/ M.I.H.

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vendors for said fractional interest shall bear the same ratio to the rate stated herein for the fee as the vendors' fractional interest bears to the fee in said lands.

2. At the date of this instrument the title to the said lands is clear and free and unencumbered except as here noted: none.

3. The vendors will not do or suffer to be done any act whereby their title or any part of the realty may be diminished or encumbered except by mutual consent of the contracting parties or their duly authorized representatives and, during the life of this instrument, will take all necessary precautions to protect the property from damage by fire, trespass, or other causes.

4. During the period covered by this instrument officers and accredited agents of the United States shall have at all proper times the unrestricted right and privilege to enter upon said lands for all proper and lawful purposes, including examination of said lands and the resources upon it.

5. It is understood that title to the said lands will be acquired by the United States by judicial proceedings to procure a safe title and that the compensation to be claimed by the owners and the award to be made and paid for said lands in said proceedings shall be upon the basis of the purchase price herein provided.

6. The acreage contained in the land herein agreed to be conveyed and acquired shall be ascer-

tained by a survey to be made by and at the expense of the United States according to the horizontal measurements by the United States in the survey of public lands or by recourse to the records of the General Land Office or by both, and the award and payment therefor shall be made on the basis of such survey.

7. Any abstract of the title to the property herein described will be obtained by the United States without cost to the vendors.

8. While this agreement primarily is intended to be made by the United States by and through the Secretary of the Interior, yet it may be entered into by and through any other officer or agency of the United States authorized thereunto, and the optional rights hereby granted to enter into this agreement may be availed of by the United States through any other officer or agency authorized to purchase said lands but the vendors' interest in this agreement shall not be assigned in whole or in part.

It is further mutually agreed that no Member of or Delegate to Congress, or Resident Commissioner, after his election or appointment, and either before or after he has qualified, and during his continuance in office shall be admitted to any share or part of this contract or agreement, or to any benefit to arise thereupon. Nothing, however, herein contained shall be construed to extend to any incorporated company, where such contract or agreement is made for the general benefit of such incorporation

or company (Section 3741, Revised Statutes, and Sections 114, 116, Act of March 4, 1909).

9. By this agreement or contract the vendors hereby agree to divest themselves of all right, title, or interest to said land including any claims, or compensation for damage or right they might have under and by virtue of what is known as the "Tucker Act." [39]

In Witness Whereof, the vendors have hereunto signed their names and affixed their respective seals, on the day first above written, with the understanding that this Agreement for Acquisition cannot be executed by the Secretary of the Interior until after it is reported to him for his consideration, and therefore the vendors for and in consideration of the \$1.00 hereinabove acknowledged as received, have and do hereby grant unto the United States of America, by and through the Secretary of the Interior or any other officer or agency of the United States authorized to acquire said lands, the option and right to enter into this Agreement for Acquisition within three months from the execution thereof by the vendors, and months within which to institute judicial proceedings for the acquisition of the lands as herein provided.

/s/ MARCELLUS B. HAYES

/s/ MARY I. HAYES

/s/ ADELBERT M. HAYES

Witness as to signature of the vendors:

/s/ ANNA M. GUNTHER,

The acquisition of the land herein described at the price and under the conditions herein stated having been approved by the Migratory Bird Conservation Commission at a meeting on Sept. 29, 1944, the Secretary of the Interior, acting by and through his agent, the Director of the Fish and Wildlife Service, has executed this agreement on behalf of the United States of America, on this 16th day of Dec., 1946.

THE UNITED STATES OF
AMERICA,

J. A. KRUG,

Secretary of the Interior.

By /s/ O. H. JOHNSON,

Acting Director, Fish and
Wildlife Service.

Acknowledgement for Individuals

State of Oregon,

County of Harney—ss.

Be it remembered that on this 9th day of October, 1946 before the subscriber, a Notary Public in and for the County of Harney, State of Oregon, appeared Marcellus B. Hayes and Mary I. Hayes, his wife and Adelbert M. Hayes, a divorced person described in and who executed the hereto annexed instrument of writing, dated October 9th, 1946, and acknowledged that they executed the said instrument freely and voluntarily for the uses and purposes therein stated; and I further certify that the

said persons are known to me to be the persons described in and who executed the said instrument.

Given under my hand and official seal.

[Seal] /s/ ANNA M. GUNTHER,

Notary Public for Oregon.

My commission expires June 20, 1950.

[Attached map of M. B. Hayes Tract is identical with Government's Exhibit No. 1, except for colored portions thereof, set forth on page 87] [41]

[Title of District Court and Cause.]

**MOTION TO STRIKE FURTHER AND SEPARATE
REPLY OF THE UNITED STATES
TO THE FURTHER AND SEPARATE ANSWER
OF THE DEFENDANTS HEREIN-
AFTER NAMED**

Comes now the Defendants Marcellus B. Hayes and Mary I. Hayes, also known as Belle Hayes, husband wife; Adelbert M. Hayes, single, and move that the further and separate reply of the United States to the further and separate answer of the within named Defendants, be stricken for the reasons following:

I.

That said further and separate reply is not timely filed.

II.

That said further and separate reply does not

state facts sufficient to warrant the relief prayed for thereunder or any relief.

III.

That said further and separate reply seeks by its terms to subvert and prevent this Court from exercising its constitutional and statutory duty of ascertaining in the manner prescribed by law the amount of just compensation to be paid for the taking of the lands under condemnation herein.

IV.

Said further and separate reply fails to state facts save to constitute an estoppel against these defendants as particularly prayed for therein.

/s/ J. W. McCULLOCH,

/s/ EDWIN D. HICKS,

of Attorney for these

answering Defendants.

Service accepted this 19th day of September, 1947.

/s/ LINUS M. FULLER,

of Attorneys for Plaintiff.

[Endorsed]: Filed September 19, 1947. [43]

In the District Court of the United States
for the District of Oregon

Civil No. 3124

UNITED STATES OF AMERICA,

Plaintiff,

vs.

MARCELLUS B. HAYES and MARY I. HAYES,
also known as BELL HAYES, husband and
wife; ADELBERT M. HAYES, single; and
HARNEY COUNTY, a municipal corporation
and political subdivision of the State of Oregon,
Defendants.

VERDICT OF THE JURY

We, the Jury, duly impaneled and sworn to try the above-entitled cause, find that the full, fair market value of the full fee simple title to the lands described in the Second Amended Complaint in Condemnation and designated as Tract No. 17, reserving the right to use in livestock ranching operations, such as harvesting of hay, and the feeding and grazing of stock, the surveyed land and Special Master Tract No. 48 in the bed of Malheur Lake, for a period of five years from October 9, 1946 in accordance with the rules and regulations of the Secretary of the Interior, and the just compensation to be paid for the taking of said lands, subject to said reservation, is the sum of \$36,500.00.

Dated at Burns, Oregon, this 25th day of September, 1947.

/s/ MURRAY MORTON,
Foreman.

[Endorsed]: Filed September 25, 1947. [44]

In the District Court of the United States
for the District of Oregon

Civil No. 3124

UNITED STATES OF AMERICA,

Plaintiff,

vs.

MARCELLUS B. HAYES and MARY I. HAYES,
also known as BELL HAYES, husband and
wife; ADELBERT M. HAYES, single; and
HARNEY COUNTY, a municipal corporation
and political subdivision of the State of Oregon,
Defendants.

JUDGMENT ON VERDICT

This cause coming on regularly for trial on the 19th day of September, 1947, plaintiff appearing by Bert C. Boylan and Linus M. Fuller, Special Assistants to the United States Attorney for the District of Oregon, and the defendants Marcellus B. Hayes and Mary I. Hayes, also known as Bell Hayes, husband and wife, appearing by J. W. McCulloch and Edwin D. Hicks, their attorneys; a jury was there-

upon duly impaneled and sworn to try the issues in said cause, the defendants assumed the burden of proof; a view of the premises under condemnation by the jury in the custody of the United States Marshal was had by order of Court on the 24th day of September, 1947, and on the 25th day of September, 1947, opening statements were made to the jury by counsel, witnesses were sworn and testimony taken; argument of counsel was had and instructions as to the law were given by the Court, whereupon, on the 25th day of September, 1947, the jury did retire for deliberation and after deliberating, and on the 25th day of September, 1947, returned into Court a verdict in words and figures as follows, to wit:

In the District Court of the United States
for the District of Oregon
Civil No. 3124

UNITED STATES OF AMERICA,
Plaintiff,

vs.

MARCELLUS B. HAYES and MARY I.
HAYES, also known as BELL HAYES,
husband and wife; ADELBERT M.
HAYES, single; and HARNEY COUN-
TY, a municipal corporation and political
subdivision of the State of Oregon.

Defendants.

VERDICT OF THE JURY

We, the Jury, duly impaneled and sworn to try the above-entitled cause, find that the full,

fair market value of the full fee simple title to the lands described in the Second Amended Complaint in Condemnation and designated as Tract No. 17, reserving the right to use in livestock ranching operations, such as harvesting of hay, and the feeding and grazing of stock, the surveyed land and Special Master Tract No. 48 in the bed of Malheur Lake, for a period of five years from October 9, 1946 in accordance with the rules and regulations of the Secretary of the Interior, and the just compensation to be paid for the taking of said lands, subject to said reservation, is the sum of \$36,500.00.

Dated at Burns, Oregon, this 25th day of September, 1947.

/s/ MURRAY MORTON,
Foreman.

Now, Therefore, by virtue of the law and by reason of the premises and the verdict above set out, It Is Hereby Ordered, Adjudged and Decreed that the full, fair market value of the fee simple title to the lands described in the second amended complaint in condemnation and designated as Tract No. 17, reserving the right to use in livestock ranching operations such as harvesting of hay and the feeding and grazing of stock, the surveyed land and Special Master Tract No. 48 in the bed of Malheur Lake for a period of five years from October 9, 1946, in accordance with rules and regulations of the Secretary of the Interior, is the sum of \$36,500.00.

Dated at Burns, Oregon, this 25th day of September, 1947.

/s/ JAMES ALGER FEE,
Judge.

[Endorsed]: Filed October 2, 1947.

Entered in Docket October 2, 1947. [46]

[Title of District Court and Cause.]

MOTION TO SET ASIDE VERDICT
OF THE JURY

Comes now the plaintiff, the United States of America by its attorneys of record, and respectfully moves the Court for an order herein setting aside the Judgment on the Verdict and the verdict of the jury returned herein and granting a new trial of this cause on the ground and for the reason (1) That the said verdict is excessive; (2) That the said verdict is not supported by any competent evidence; (3) That the said verdict is the result of passion, prejudice and caprice on the part of the jury and is not in any reasonable conformity with the competent evidence produced before said jury nor with the instructions of the Court as to the law.

/s/ BERT C. BOYLAN,
Special Assistant to the
United States Attorney.

Due and legal service of the foregoing Motion is acknowledged and accepted this 3rd day of October, 1947.

/s/ EDWIN D. HICKS,
By MARIETA A. KELLUM,
of Attorneys for Defendants.

[Endorsed]: Filed October 3, 1947. [47]

[Title of District Court and Cause.]

ORDER

Now at this day this cause coming on to be heard upon the Motion of the United States of America, plaintiff herein, for an order setting aside the verdict of the jury and the judgment on the verdict entered in the above-entitled cause on the 25th day of September, 1947, and granting a new trial therein, plaintiff appearing by Bert C. Boylan and Linus M. Fuller, Special Assistants to the United States Attorney, and the defendants appearing by Edwin D. Hicks of counsel for the defendants, and the motion having been duly presented by oral argument and the Court being fully advised in the premises, It Is Hereby Ordered and Adjudged that the verdict of the jury and the judgment on the verdict entered herein on the 25th day of September, 1947, be and the same are hereby set aside; And It Is Hereby Further Ordered and Adjudged on the motion of the Court that the Declaration of Taking filed in this cause on the 11th day of Febru-

ary, 1947, be and the same is hereby stricken from the files in this cause and that the judgment on the Declaration of Taking and the Order granting immediate possession be and the same is hereby vacated; And It Is Further Ordered and Adjudged that this cause be and same is hereby dismissed.

/s/ JAMES ALGER FEE,

District Judge.

Dated at Portland, Oregon, October 20, 1947.

[Endorsed]: Filed October 23, 1947. [48]

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice is hereby given that the United States of America, plaintiff above named, hereby appeals to the Circuit Court of Appeals for the Ninth Circuit from that part of the Order and Judgment entered October 20, 1947, and filed October 23, 1947, as follows:

“And It Is Hereby Further Ordered and Adjudged on the motion of the Court that the Declaration of Taking filed in this cause on the 11th day of February, 1947, be and the same is hereby stricken from the files in this cause and that the judgment on the Declaration of Taking and the Order granting immediate possession be and the same is hereby vacated; and It Is Further Ordered and Adjudged that this cause be and the same is hereby dismissed.”

Dated at Portland, Oregon, this 16th day of January, 1948.

/s/ HENRY L. HESS,
United States Attorney.

/s/ LINUS M. FULLER,
Special Assistant to the
U. S. Attorney.

/s/ BERT C. BOYLAN,
Special Assistant to the
U. S. Attorney.

[Endorsed]: Filed January 16, 1948. [49]

[Title of District Court and Cause.]

NOTICE OF CROSS-APPEAL

Notice is hereby given that Marcellus B. Hayes and Mary I. Hayes, also known as Bell Hayes, husband and wife, and Adelbert M. Hayes, single, defendants above named, hereby appeal and cross-appeal to the Circuit Court of Appeals for the Ninth Circuit from that part of the order entered in the above-entitled *clause* on October 20, 1947 and filed October 23, 1947, which vacated and set aside the verdict of the jury and the judgment on the verdict entered herein on September 25, 1947.

Dated at Portland, Oregon this nineteenth day of January, 1948.

/s/ JOHN W. McCULLOCH,
HICKS, DAVIS & TONGUE,
Attorneys for Defendants, Marcellus B. Hayes,
Mary I. Hayes, and Adelbert M. Hayes.

[Endorsed]: Filed January 19, 1948. [50]

[Title of District Court and Cause.]

MOTION

Come now the defendants Marcellus B. Hayes and Mary I. Hayes, also known as Bell Hayes, husband and wife, and Adelbert M. Hayes, a single person, through Thomas H. Tongue, III, one of their attorneys, and move for an order granting leave to file a bond for costs, pursuant to a Notice of Cross-Appeal filed on January 19, 1948, in said case on behalf of the aforesaid defendants.

/s/ THOMAS H. TONGUE,
Of Attorney for Defendants Marcellus B. Hayes
and Mary I. Hayes and Adelbert M. Hayes.

Due and legal service of the foregoing Motion, by receipt of a duly certified copy thereof, as required by law, is hereby accepted in Multnomah County, Oregon, on this 2nd day of February, 1948.

/s/ LINUS M. FULLER,
Of Attorneys for Plaintiff.

[Endorsed]: Filed February 2, 1948. [51]

[Title of District Court and Cause.]

ORDER

This matter having come on for hearing regularly in open court on motion of defendants Marcellus B. Hayes and Mary I. Hayes, also known as Bell Hayes, husband and wife, and Adelbert M. Hayes, a single person, appearing by and through Thomas H. Tongue, III, one of their attorneys, and good and sufficient reasons appearing therefor, it is hereby

Ordered that the aforesaid defendants may be and they are hereby granted leave to file a bond for costs pursuant to the notice of Cross-Appeal heretofore filed in said case on behalf of said defendants.

Dated this 2nd day of February, 1948.

/s/ CLAUDE McCOLLOCH,
U. S. District Judge.

[Endorsed]: Filed February 2, 1948. [52]

[Title of District Court and Cause.]

BOND FOR COSTS ON APPEAL

Bond No. 4915635

Whereas, Marcellus B. Hayes, Mary I. Hayes, also known as Bell Hayes, husband and wife, and Adelbert M. Hayes, single, defendants in the above-entitled action appeal to the Circuit Court of Appeals from an order made and entered against said defendants on October 20, 1947 and filed October 23rd, 1947.

Now, Therefore, in consideration of the premises, and of such appeal, the undersigned, the Fidelity and Deposit Company of Maryland, of Baltimore, Maryland, a corporation organized and existing under the laws of the state of Maryland, and empowered to become surety upon bonds, undertakings, etc., does hereby undertake and promise, on the part of the appellant, that said appellant will pay all costs in a sum not exceeding Two Hundred Fifty and no/100 (\$250.00) Dollars, if the appeal is dismissed or the judgment affirmed, or of such costs as the appellate court may award if the judgment is modified.

[Seal]

FIDELITY AND DEPOSIT
COMPANY OF MARYLAND

By /s/ CLARENCE D. PORTER,
Attorney in Fact.

Countersigned

CLARENCE D. PORTER,
Resident Agent.

[Endorsed]: Filed February 2, 1948. [53]

[Title of District Court and Cause.]

MOTION

Come now Henry L. Hess, United States Attorney for the District of Oregon, and Linus M. Fuller, Special Assistant to the United States Attorney, and defendants Marcellus B. Hayes, et al., by and through Edwin D. Hicks, one of their attor-

neys, and based upon the attached affidavit, moves the Court for an order extending the time for filing the record on appeal and cross-appeal and docketing the action, granting to plaintiff and to said defendants ninety days from the date of the notice of appeal herein.

This motion is made pursuant to Title 28, Sec. 723 c, U.S.C.A., Rule 73(g).

Dated at Portland, Oregon, this 3rd day of February, 1948.

/s/ HENRY L. HESS,

United States Attorney for
the District of Oregon.

/s/ LINUS M. FULLER,

Special Assistant to the
United States Attorney.

/s/ EDWIN D. HICKS,

Of Attorneys for Marcellus B.
Hayes, et al. [54]

State of Oregon,
County of Multnomah—ss.

Affidavit

I, Linus M. Fuller, being first duly sworn, depose and say that I am a Special Assistant to the United States Attorney for the District of Oregon; that I am one of the attorneys of record representing plaintiff in the case in the District Court of the United States for the District of Oregon entitled “United States of America, Plaintiff, versus Marcellus B. Hayes and Mary I. Hayes, also known as Bell Hayes, husband and wife; Adelbert M.

Hayes, single, and Harney County, a municipal corporation and political subdivision of the State of Oregon, Defendants, Civil No. 3124''; that notice of appeal was duly filed in said cause on the 16th day of January, 1948; that the plaintiff has been unable to obtain a transcript of the testimony adduced at the trial of said cause because the Court Reporter, Mr. Cloyd D. Rauch, who reported the trial of this cause is at the present time engaged in reporting a hearing before Mr. Estes Snedecor, the Referee in Bankruptcy, and is getting out a daily report of said hearing; that Mr. Rauch will not be able to complete the transcript in this cause before the 1st day of March, 1948.

This affidavit is made in support of a motion for an extension of time within which to file the record on appeal.

Dated at Portland, Oregon, this 3rd day of February, 1948.

/s/ LINUS M. FULLER.

Subscribed and sworn to before me this 3rd day of February, 1948.

[Seal] /s/ BERT C. BOYLAN,

Notary Public for Oregon.

My Commission Expires May 2, 1949.

[Endorsed]: Filed February 5, 1948. [55]

[Title of District Court and Cause.]

ORDER

This matter coming on to be heard this date upon motion of plaintiff through its attorneys, Henry L. Hess, United States Attorney for the District of Oregon and Linus M. Fuller, Special Assistant to the United States Attorney, and upon the motion of Marcellus B. Hayes and Mary I. Hayes, also known as Bell Hayes, husband and wife; Adelbert M. Hayes, single; appearing by and through Edwin D. Hicks, one of their attorneys, for an order extending time for the filing of the record on appeal and cross-appeal for docketing the within action and appealing to the Circuit Court of Appeals for the reason that the Court Reporter who reported the within action is engaged at the present time in reporting a hearing before the Referee in Bankruptcy and is unable at this time to prepare the transcript of the record and will be unable to complete said record before the 1st day of March, 1948, and the Court being fully advised in the premises, It Is Ordered that time for filing of the record on appeal and cross-appeal and docketing the within action be and it is hereby extended to ninety days from the date of the first notice of appeal.

Dated at Portland, Oregon, this 5th day of February, 1948.

/s/ CLAUDE McCULLOCH,
District Judge.

[Endorsed]: Filed February 5, 1948. [56]

[Title of District Court and Cause.]

STATEMENT OF POINTS TO BE RELIED
UPON BY PLAINTIFF-APPELLANT

The United States of America, plaintiff-appellant, makes the following statement of points on which it will rely on appeal:

(1) The district court erred in striking the declaration of taking, vacating the judgment thereon and the order granting immediate possession and dismissing the proceedings.

(2) The district court erred in not permitting the contract between the parties to be presented to the jury as a measure of damages in this case.

(3) The district court erred in holding that the contract between the parties was negotiated by the agents of the Government in an unethical manner.

(4) The district court erred in refusing to enforce the contract between the landowners and the Government.

(5) The district court erred in setting aside the contract between the parties on the grounds:

(a) That the landowners did not know what was in it; [57]

(b) That the landowners thought they were getting an option to lease the land yearly at the expiration of the five-year reservation;

(c) That the landowners did not know they were compromising the damage claim against the Government; and

(d) That the agents who negotiated the contract for the Government were unethical in writing into the contract things that the landowners did not agree to and stipulations entirely contrary to what their agreement was.

(6) The district court erred in holding that if the Declaration of Taking were left standing, and not dismissed by the Government, it would consider the amount set by the jury as the final judgment.

(7) The district court erred in permitting evidence of value of the land in excess of the consideration expressed in the agreement, that is \$16,000, with the five-year reservation.

(8) The district court erred in allowing testimony as to the production of grain on the tract of land as early as 1929 and 1931.

(9) The district court erred in overruling the Government's motion to strike testimony as to the valuation of the property by witnesses who did not take into consideration the reservation of five years' use of the land in making their appraisal.

/s/ HENRY L. HESS,

United States Attorney.

/s/ LINUS M. FULLER,

Special Assistant to the

United States Attorney.

State of Oregon,
County of Multnomah—ss.

I, Edwin D. Hicks, do hereby admit due and legal service of the within Statement of Points to be Relied Upon by Plaintiff-Appellant in Multnomah County, Oregon, on this 7th day of April, 1948, by receiving a true copy thereof duly certified to be such by Linus M. Fuller, one of the attorneys for Plaintiff-Appellant. I further certify that I am a resident and inhabitant of the said County, and that I am one of the attorneys of record for the Defendant-Appellants.

/s/ EDWIN D. HICKS,

One of the Attorneys for the
Defendant-Appellant.

[Endorsed]: Filed April 7, 1948. [59]

[Title of District Court and Cause.]

STATEMENT OF POINTS TO BE RELIED ON
BY CROSS-APPELLANTS

Marcellus B. Hayes and Mary I. Hayes, also known as Bell Hayes and Adelbert M. Hayes, defendants and cross-appellants herein, make the following statement of points on which they will rely on appeal:

1. The District Court erred in striking the declaration of taking, vacating the judgment thereon and the order granting immediate possession and dismissing the proceedings.

2. The District Court erred in holding that the verdict of the jury as to the value of the property involved was excessive.
3. The District Court erred in holding that the jury, in determining the value of said property, did not give proper value to the reservation retained by defendants and disregarded the instructions of the Court to give value to said reservation.
4. The District Court erred in holding that it was error on the part of the Court to deny admission into evidence of the contract between the parties as a measure of damages in this case. [60]

HICKS, DAVIS & TONGUE,
J. W. McCULLOCH,
Attorneys for Cross-
Appellants.

A true Copy:

/s/ THOMAS N. TONGUE III
of Attys for Cross-Appellants.

Due and legal service of the foregoing statement of points to be relied on by Cross-Appellants, by receipt of a duly certified copy thereof, is hereby accepted in Multnomah County, Oregon, on this 12th day of April, 1948.

LINUS M. FULLER,
Of Attorneys for
United States.

[Endorsed]: Filed April 12, 1948. [61]

[Title of District Court and Cause.]

ORDER TRANSMITTING ORIGINAL
EXHIBITS

On motion of the plaintiff and appellant herein, and good cause appearing therefor, It Is Hereby Ordered that original Exhibits numbered 1, 2, and 3 in the above cause be transmitted to the Circuit Court of Appeals in connection with the appeal of this case.

Dated this 12th day of April, 1948.

CLAUDE McCOLLOCH,
Judge.

[Endorsed]: Filed April 12, 1948. [62]

[Title of District Court and Cause.]

DOCKET ENTRIES

1946

Apr. 22—Filed Complaint.

Apr. 22—Issued summons—to Marshal.

Apr. 22—Filed praecipe U. S. for cert. copy of complaint—issued.

Aug. 13—Filed motion for leave to file amended complaint.

Aug. 13—Filed and entered order granting leave to file amended complaint. Fee.

Aug. 13—Filed amended complaint.

Aug. 13—Filed praecipe, U. S. summons and 4 copies on amended complaint.

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Aug. 13—Issued summons on amended complaint—to Marshal.

Aug. 13—Filed summons returned unexecuted.

Sept. 19—Filed answer of Harney County, Oregon.

Oct. 2—Filed ans. of Bell Hayes & Marcellus B. Hayes.

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Feb. 11—Filed declaration of taking.

Feb. 11—Filed praecipe U. S. for dup. receipts of clerk for \$16,000.00 on deposit—issued.

Feb. 13—Filed motion for order granting leave to file 2nd amended complaint.

Feb. 13—Filed & entered order granting leave to file 2nd amended complaint. McC.

Feb. 13—Filed second amended complaint in condemnation.

Feb. 14—Filed praecipe U. S. summons on 2nd amended complaint.

Feb. 15—Issued summons on 2nd amended complaint—to Marshal.

Feb. 26—Filed praecipe U. S. for 2 cert. copies of Judgment on Decl. of Taking and Order Granting Immediate Possession—issued.

Feb. 26—Filed & entered judgment on declaration of taking & for immediate possession. McC.

May 8—Filed Transcript of Proceedings Feb. 27, 1947.

Aug. 29—(Burns) Entered order setting for trial Sept. 17, 1947, at Burns. Fee.

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Sept. 11—Filed reply to answer of defts. Bell Hayes & Marcellus B. Hayes.

Aug. 23—(Burns) Filed answer of deft. Harney Co.

Sept. 19—(Burns) Record of empaneling jury & trial, order continuing cause to Sept. 24, 1947. Fee.

Sept. 19—(Burns) Filed & entered order for jury view. Fee.

Sept. 19—(Burns) Filed motion to strike further & separate reply of U. S. to further & separate answer of Marcellus B. Hayes, et al.

Sept. 24—(Burns) Record of trial, jury excused until Sept. 25, record of trial of certain issues before the Court. Fee.

Sept. 25—(Burns) Record on trial verdict for \$36,500.00 value & Judgment fixing value entered. Fee.

Sept. 25—(Burns) Filed verdict.

Sept. 27—(Burns) Filed exhibits 1, 2 & 3.

Oct. 2—Filed Judgment on verdict.

Oct. 3—Filed Motion to set aside verdict of the jury.

Oct. 3—Filed praecipe U. S. for cert. copy of judgment on verdict—issued.

Oct. 20—Entered order setting aside verdict & judgment striking declaration of taking from files, vacating order for immediate possession and Judgment on declaration of taking and dismissing cause. Fee.

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- Oct. 23—Filed excerpts in re Motion to set aside verdict of the jury.
- Oct. 23—Filed order setting aside verdict & judgment, striking declaration of taking from files, vacating order for immediate possession and Judgment on declaration of taking & dismissing cause.
- Oct. 23—Filed praecipe, U. S. for 2 cert. copies of order—issued. [63]

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- Jan. 2—Filed (2) summons with return.
- Jan. 7—Filed judgment roll.
- Jan. 16—Filed notice of appeal by U. S.
- Jan. 16—Copy notice of appeal to McCulloch, Hicks & Tongue, and to Leland & Duncan.
- Jan. 19—Filed Notice of Cross-Appeal. Tongue.
- Jan. 19—Mailed copy of Notice of cross-appeal to Henry L. Hess.
- Feb. 2—Filed motion for order for leave to file bond pursuant to notice of cross-appeal.
- Feb. 2—Filed & entered order for leave to file bond pursuant to notice of cross-appeal. McC.
- Feb. 2—Filed bond for costs on appeal.
- Feb. 5—Filed motion for order allowing 90 days to file & docket appeal, etc.
- Feb. 5—Filed & entered order allowing 90 days to file & docket appeal. McC.
- Mar. 12—Filed Transcript of Testimony & Proceedings.

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Apr. 7—Filed Statement of points.

Apr. 7—Filed Designation of record.

Apr. 12—Filed statement of points of cross-appellant. [64]

[Title of District Court and Cause.]

DESIGNATION OF CONTENTS OF RECORD
ON APPEAL

Comes now the United States of America, the appellant herein, pursuant to Rule 75, Federal Rules of Civil Procedure, and designated the following portions of the record to be contained in the record on appeal to the United States Circuit Court of Appeals for the Ninth Circuit, in the above-entitled cause:

1. Complaint in condemnation filed April 22, 1946.
2. Summons issued April 22, 1946.
3. Order granting leave to file amended complaint entered August 13, 1946.
4. Amended complaint in condemnation filed August 13, 1946.
5. Summons on amended complaint issued August 13, 1946.
6. Answer of Bell Hayes and Marcellus B. Hayes, filed October 2, 1946.
7. Declaration of Taking filed February 11, 1947.

8. Order granting leave to file Second Amended Complaint filed February 13, 1947.
9. Second amended complaint in condemnation filed February 13, 1947.
10. Summons on second amended complaint issued February 15, 1947.
11. Judgment on Declaration of Taking and Order granting immediate possession, entered February 26, 1947.
12. Reply to answer of defendant Bell Hayes and Marcellus B. Hayes filed September 11, 1947.
13. Motion to strike further and separate reply of United State to further and separate answer of Marcellus B. Hayes, et al., filed September 19, 1947.
14. Verdict of jury filed September 25, 1947.
15. Exhibits 1, 2 and 3. [65]
16. Judgment on verdict filed October 2, 1947.
17. Motion to set aside verdict of jury filed October 3, 1947.
18. Order setting aside verdict and judgment, striking Declaration of Taking from files, vacating order of immediate possession and judgment on Declaration of Taking and dismissing cause entered October 20, 1947.
19. Two summons with returns filed January 2, 1948.
20. Notice of appeal by plaintiff dated and filed January 16, 1948.
21. Notice of cross-appeal filed by defendants January 19, 1948.

22. Motion for order for leave to file bond pursuant to notice of cross-appeal filed February 2, 1948.
23. Order for leave to file bond pursuant to notice of cross-appeal filed and entered on February 2, 1948.
24. Bond for costs on appeal filed February 2, 1948.
25. Motion for order allowing 90 days to file and docket appeal filed February 5, 1948.
26. Order allowing 90 days to file and docket appeal filed and entered on February 5, 1948.
27. Transcript of testimony filed March 12, 1948.
28. Statement of points to be relied upon by plaintiff-appellant filed April 7, 1948.
29. Designation of contents of record on appeal filed April 7, 1948.
30. Statement of points by cross-appellant.
31. Docket entries.

/s/ HENRY L. HESS,

United States Attorney for
the District of Oregon.

/s/ LINUS M. FULLER,

Special Assistant to the
United States Attorney.

State of Oregon,
County of Multnomah—ss

I, Edwin D. Hicks, do hereby admit due and legal service of the within Designation of Contents of Record on Appeal on this 7th day of April, 1948, by receiving a true copy thereof duly certified to be

such by Linus M. Fuller, one of the attorneys for Plaintiff-Appellant. I further certify that I am a resident and inhabitant of the said County, and that I am one of the attorneys of record for the Defendant-Appellants.

/s/ EDWIN D. HICKS,

One of the Attorneys for the Defendant-Appellants.

[Endorsed]: Filed April 7, 1948. [66]

United States of America,
District of Oregon—ss.

CLERK'S CERTIFICATE

I, Lowell Mundorff, Clerk of the District Court of the United States for the District of Oregon, do hereby certify that the foregoing pages numbered 1 to 67 inclusive constitute the transcript of record on appeal from a judgment of said court in a cause therein numbered Civil 3124, in which the United States of America is Plaintiff and Appellant, and Marcellus B. Hayes, Mary I. Hayes, and Adelbert M. Hayes, are defendants, Appellees, and Cross-Appellants; that the said transcript has been prepared by me in accordance with the designation of contents of record on appeal filed by the appellant, and in accordance with the rules of this court; that I have compared the foregoing transcript with the original record thereof and that it is a full, true and correct transcript of the record and proceedings had in said cause, in accordance with the said desig-

nation as the same appears of record and on file in my office and in my custody.

I further certify that I have enclosed under separate cover a duplicate transcript of the testimony and proceedings taken and filed in this cause, together with exhibits Nos. 1, 2 and 3 filed in said cause.

In Testimony Whereof I have hereunto set my hand and affixed the seal of said court in Portland, in said District, this 13th day of April, 1948.

[Seal] LOWELL MUNDORFF,
Clerk.

By /s/ F. L. BUCK,
Chief Deputy. [67]

In the District Court of the United States
for the District of Oregon

No. Civ. 3124

UNITED STATES OF AMERICA,

Plaintiff,

vs.

MARCELLUS B. HAYES and MARY I. HAYES,
also known as BELL HAYES, husband and
wife; ADELBERT M. HAYES, single; and
HARNEY COUNTY, a municipal corporation
and political subdivision of the State of Oregon,
Defendants.

Before: Honorable James Alger Fee,
Judge.

Appearances:

Messrs. Bert C. Boylan and Linus M. Fuller,
Special Assistants to the United States Attorney,
appearing for United States of America, plaintiff;

Messrs. John W. McCulloch and Edwin D. Hicks,
attorneys for defendants Hayes;

Honorable Leland S. Duncan, District Attorney
for Harney County, Oregon, appearing for Defend-
ant Harney County, Oregon.

Court Reporter: Cloyd D. Rauch. [1*]

Burns, Oregon,
Friday, September 19, 1947,
1:30 P.M.

PROCEEDINGS

The Court: United States versus Bell Hayes,
Civil 3124, called for trial.

Mr. Hicks: The defendants are ready, your
Honor.

Mr. Fuller: The plaintiff is ready.

The Court: Call a jury.

(A jury was duly empanelled and sworn.)

Mr. Fuller: If the Court please, at this time we
are moving the Court for an order for this jury to
be taken to a view of the premises in the custody of
the United States Marshal.

Mr. Hicks: In which we join.

The Court: The Court grants the order and will
direct a view of the premises.

Ladies and gentlemen, as I told you at the outset,
the Court is drawing this jury today because it is
more convenient, in order to give a proper start on
next Wednesday morning. So after the Court gives
you these instructions you will be allowed to go
home and stay there and be back here at nine
o'clock next Wednesday morning. At that time you
will be taken to view these lands and then return in
court and the case will probably be tried sometime
the next day. So this puts somewhat of a burden on
you, in a way, because you are now [2] drawn, and
you were drawn on account of your fair and im-

partial attitude. Now, the only difficulty about separating you for such a length of time is that you may be in the presence of some people that may talk about the case, or something of the sort, and it is a little difficult to always avoid that sort of a thing, and I instruct you that up until the time that the case is submitted to you by the Court you should not discuss it among yourselves, nor discuss it with other persons, and that means talking it over at home or with anybody else on the outside; and, further, you should not remain in the presence of people who are discussing it. Sometimes people, casual witnesses, and so forth, begin to discuss the case in your presence. If you hear anything of that sort you should get out of the way so you won't hear anything, if you can help it, and if anybody persistently does that, why, of course, you report that to me. I don't think that will happen however.

So now, with that admonition, I now excuse you until Wednesday morning at ten o'clock. You are now excused.

(Whereupon, at the hour of 2:15 o'clock p.m., the jury was excused and the trial of the cause was continued to 9:00 o'clock a.m., Wednesday, September 24, 1947.) [3]

Wednesday, September 24, 1947, at the hour of 9:58 o'clock a. m., the trial of the above-entitled cause was resumed and continued as follows:

The Court: Will you call the names of the jurors in the Hayes case.

(The roll of the jury was thereupon called by the Clerk of the Court.)

The Clerk: The jurors are all present, your Honor.

The Court: Ladies and gentlemen, you will take the box in your regular order, please. Is transportation now available?

Ladies and gentlemen, the attorneys have requested a view of the premises and the Court is about to send you down to look this property over, and you will remember what I have said to other juries. You will be in charge of the United States Marshals. They will do whatever they can for your comfort and convenience, but they will keep you together in a body, so that each juror will see what every other juror sees. The United States Marshals are not advised as to the issues of the case, so there is no use asking them anything that has to do with the situation. So you will simply have to wait until the evidence comes in. The Court will not be able, through press of business, to go with you, but you will be taken down there in a bus, and anything that you want to see, anything that the jury as a whole wants to see, you will be allowed to see, and the Marshals are instructed to follow a line that will show you [4] most of the property, anyhow; but if there is anything specific you want to see they will have the bus stop so you can be taken over there. There is some of it you won't be able to get to, but otherwise than that you will be given an opportunity to see whatever you want to see on the premises.

Again I admonish you that you are not to talk this matter over among yourselves nor with other

persons nor remain in the presence of other persons until the time it is finally submitted.

You are now placed in charge of the United States Marshals and they will take you to a view, and you will return here this afternoon.

Mr. Fuller: If the Court please, we have a map——

Mr. Hicks: No objection.

The Court: The map will now be admitted.

(The map so produced and received, was thereupon received as Government's Exhibit 1.)

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"B"

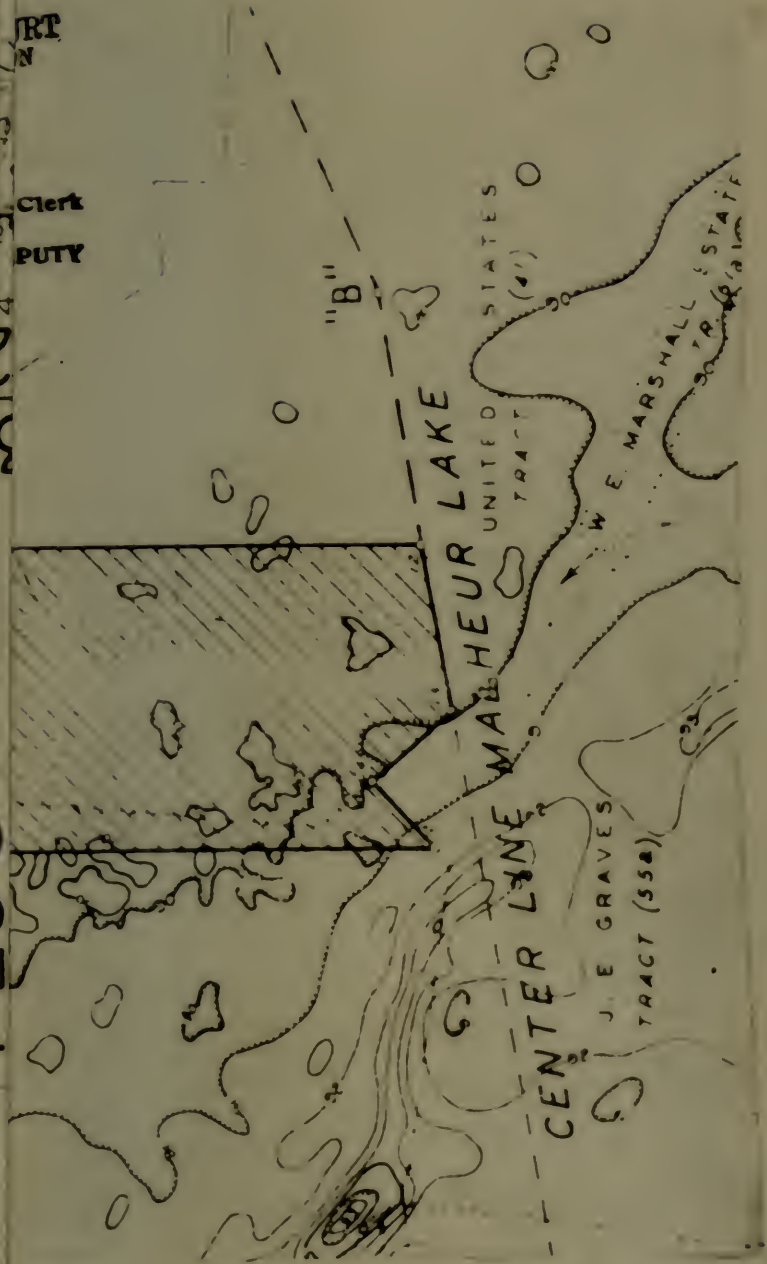
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UNITED STATES
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W E MARSHALL STATE
TRACT (121)

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J. E. GRAVES
TRACT (550)



persons nor remain in the presence of other persons until the time it is finally submitted.

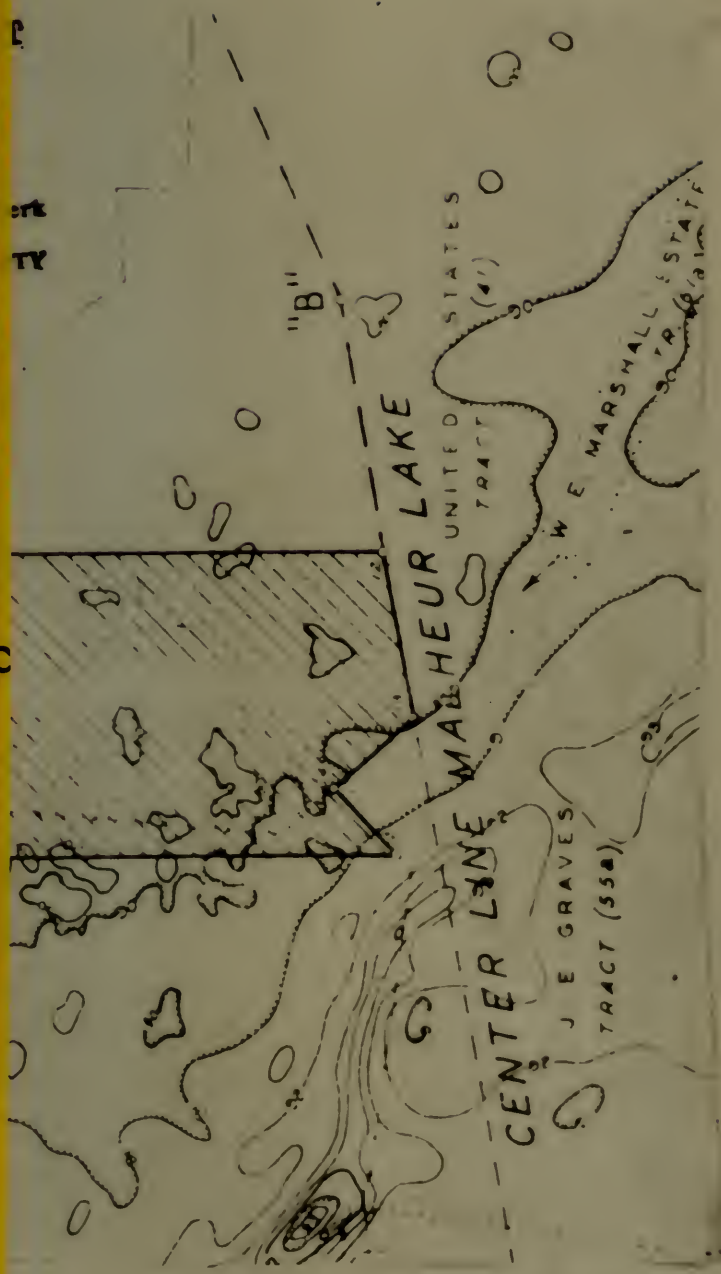
You are now placed in charge of the United States Marshals and they will take you to a view, and you will return here this afternoon.

Mr. Fuller: If the Court please, we have a map——

Mr. Hicks: No objection.

The Court: The map will now be admitted.

(The map so produced and received, was thereupon received as Government's Exhibit 1.)



The Court: If there is no objection on the part of anybody, I will allow the Marshals to show the map to the jurors while they are on the place.

Mr. Fuller: No objection.

Mr. Hicks: No objection.

The Court: You are now excused, in charge of the Marshals.

(Whereupon, at the hour of 10:02 o'clock a. m., Wednesday, September 24, 1947, the jury departed to view the [5] premises involved herein, and at the hour of 3:10 o'clock p. m. of said date the jury returned to the presence and hearing of the Court, and the following proceedings were had:)

The Court: Ladies and gentlemen, the Court is trying another proceeding at this time and will not be able to reach this case until tomorrow morning. Since you have had your exercise for today, I now excuse you until tomorrow morning at nine o'clock, and at the same time I suggest to you that you follow the former admonitions regarding communications; in other words, do not discuss the case amongst yourselves nor with other persons nor remain in the presence of other persons who may be discussing it, until it is finally submitted.

You are now excused until tomorrow morning at nine o'clock.

(The jury was thereupon excused from the presence and hearing of the Court, and thereafter, at 3:30 o'clock p. m. of this 24th day of September, A. D. 1947, further proceedings herein were had before the Court, not in the presence of the jury, as follows:)

The Court: Did you decide to try the Hayes case first?

Mr. Hicks: Yes, your Honor.

Mr. Fuller: If the Court please, at this time we are offering in evidence contract of agreement for acquisition of lands between M. B. Hayes, Mary I. Hayes and Delbert M. Hayes and the Government for the acquisition of a tract of land designated [6] as Tract No. 17, comprising 1101.68 acres, the description of the land being set forth in the agreement, together with a signed letter of acceptance from the Department of the Interior.

Mr. Hicks: May it please the Court, before making my objections on the offer, may I make this statement into the record? This particular problem in the related proceeding is a different problem, in that a somewhat different question arising in a different way has already been considered before, and the Court, irrespective of our contentions, has considered that the matter should be considered by the Court and should not be considered by the jury in the trial of the case. I understand that is your Honor's position regarding the matter now, and I simply wanted the record to note, under the authorities that we submitted here, that on the question of the overreaching here, the very circumstances attending the execution was a matter for consideration of the jury. I simply wanted to state it for the purposes of the record and ask you to consider it in your Honor's ruling, if that is your Honor's ruling.

The Court: Yes.

Mr. Hicks: In regard to the offer just made, we admit that it was signed by the parties, that it does bear the signatures of the parties involved, and that the—I assume that it is an acceptance—we admit that this is a copy and that the signature is that of Mr. Johnson. The only objection I have at all is that it is incompetent, irrelevant and immaterial, [7] in view of the issues that are before your Honor now. In that connection, I point out the circumstance that at the time this document was signed by the Hayeses, in accordance with the date shown, there was pending in this Court an action in condemnation for the taking of the lands described in the contract. That case was pending. There had not been, however, a Declaration of Taking at that time. I expect, of course, to offer as exhibits the pleadings to identify the dates of their filing and to show that the case was pending at that time, and, that being true, and in view of the prayer of the original complaint and of the reply filed herein, which is that this Court assess just compensation, in view of the pleadings, in view of the action in condemnation, that any attempt by Government agents to *forclose* the Court of its duty and obligation, and of the jury to assess just compensation, is not in accordance with the Court's decision, and for that reason is incompetent, irrelevant and immaterial.

The Court: Admitted.

(Said agreement and accompanying letter of acceptance from Department of the Interior, so offered and received, were thereupon marked received as Government's Exhibit 2.)

GOVERNMENT'S EXHIBIT NO. 2

[Letterhead United States Department of the
Interior Fish and Wildlife Service]

Registered Mail

Mr. M. B. Hayes,

Box 368,

Burns, Oregon.

Chicago, Ill.,

Dec. 16, 1946

Dear Mr. Hayes:

On October 9, 1946, you, Mary I. Hayes, your wife, and Adelbert M. Hayes, executed an agreement providing for the sale of 1,101.68 acres of land, more or less, in Harney County, Oregon to the United States of America at a total cost of \$16,000.00. This agreement included a provision that it might be accepted at any time within three months after execution by you.

You are hereby notified that the offer to sell this land was accepted and executed on behalf of the United States of America on the date at the head of this letter, and that it now is a binding agreement. A copy of the purchase agreement as executed is enclosed for your file.

Very truly yours,

O. H. JOHNSON,

Acting Director.

[Stamped] Received Dec. 24, 1946, Department
of Interior, Fish and Wildlife Service, Region 1.

GAO

Accts.

Refuge Div. Region Title.

Mr. Adelbert M. Hayes,
Box 368,
Burns, Oregon.

Dec. 16, 1946.

Dear Mr. Hayes:

On October 9, 1946, you, M. B. Hayes and Mary I. Hayes, his wife, executed an agreement providing for the sale of 1,101.68 acres of land, more or less, in Harney County, Oregon to the United States of America at a total cost of \$16,000.00. This agreement included a provision that it might be accepted at any time within three months after execution by you.

You are hereby notified that the offer to sell this land was accepted and executed on behalf of the United States of America on the date at the head of this letter, and that it now is a binding agreement.

A copy of the purchase agreement as executed has been transmitted to M. B. Hayes.

Very truly yours,

/s/ O. H. JOHNSON,

cc: GAO Acting Director.

ACCTS

Region

Refuges

Title

[Stamped]: Received Dec. 24, 1946, Department of Interior, Fish and Wildlife Service, Region 1.

[Endorsed]: Filed April 10, 1948.

[The Agreement for Acquisition has been previously printed at pages 46 to 53 and is not reprinted here.]

Mr. Hicks: We will call Mrs. Hayes. [8]

MARY I. HAYES

one of defendants herein, was thereupon produced as a witness in behalf of the defendants Hayes and, having first been duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Hicks:

Q. Mrs. Hayes, will you please state your name?

A. Mary I. Hayes, or Bell, better known as Bell.

Q. Mrs. Hayes, you are the wife of Marcellus B. Hayes, is that correct? A. Yes.

Q. And what is your age, Mrs. Hayes?

A. I will be seventy-four years old the first day of February of this year, this next year.

Q. You are seventy-three now?

A. I am seventy-three now.

Q. And what is Mr. Hayes' age, your husband?

A. He is eighty-three. He will be eighty-four the seventeenth of February.

Q. Now, Mrs. Hayes, you are Mary I. Hayes——

A. Mary I. Hayes, or Bell Hayes, known as Bell Hayes. My name is Isabelle.

Q. ——who is named in the pleadings in this case?

A. Yes. I was always called Bell at home, and naturally have gone through life—— [9]

Q. Mrs. Hayes, you are familiar, of course, with the Malheur Lake litigation? A. Yes, I am.

Q. And how long has that been pending, to your knowledge?

(Testimony of Mary I. Hayes.)

A. The first case between the State of Oregon and the Government was in '31, 1831.

Q. You mean 1931? A. 1931.

Q. And can you state about the time that Mr. McCulloch first began representation of you and Mr. Hayes as attorney?

A. If I remember, it was in '38, the trial we had in 1938.

Q. And who have been your attorneys continuously since that time in respect to this litigation?

A. Well, it was Mr. Duncan and Mr. McCulloch, until Mr. Duncan died. Since that time it has been Mr. Hicks and Mr. McCulloch.

Q. Were those parties serving as your attorneys throughout the dates you mention up to the present time, with the exception of Mr. Duncan, who is now deceased? A. Yes.

Q. And I take it that Mr. McCulloch and myself are presenting you in the proceeding at this time?

A. You certainly are.

Q. Was there ever a time in that period when you had discharged either Mr. McCulloch or myself as your attorneys? A. No sir. [10]

Q. Referring to Government's Exhibit 2 in this cause, I hand it to you, Mrs. Hayes, and ask you whether or not you signed it and whether you received in the mail a letter of the form as shown on the exhibit as a part of it?

A. This is that contract, isn't it? Yes, that's our signatures.

Q. Now, Mrs. Hayes, will you state to the Court,

(Testimony of Mary I. Hayes.)

in your own way, the circumstances which led up to the execution of that form of agreement by yourself and your husband.

A. Well, Mr. Schaar met Mr. Hayes down town several times, kept wanting to get this land. He called me over the phone several times, and I told him we wouldn't talk to him at all unless we were all three present. So finally he called up one time, and we happened to all be at home, and I said, "Come on up," and he came, and at this time we had already been served with the notice of the condemnation suit and had sent our papers to Mr. McCulloch and he had filed our answer. So Mr. Schaar, he said it would be better to compromise, and that he was trying to get to compromise all the settlers and he had hopes of keeping it out of court, settling it out of court, and offered us \$11,000, and we told him we wouldn't consider it at all; and he talked on and talked on, and finally we did agree on \$16,000 and the use of the place for five years free, and we was to have our money at once. We owed bills and we were going to California on a trip and we wanted this money before we went. He said we could get our money in a month, but not later than two months. Well, that was in October, I believe the 8th. Anyway, it was October, the first of October. Well, we kept waiting and waiting and we didn't hear, we didn't know what had happened, so we put our trip off, we didn't meet these bills. We went to California, started to California, the thirtieth of January, and as we came home we passed the post

(Testimony of Mary I. Hayes.)

office, Alfred Brown was there, and he said, "Your money has been deposited for you." So that was the second day of March, and that is all the notice that we ever got that our money was deposited.

Q. Well, now, Mrs. Hayes, how many discussions were there altogether, as best you can recollect, concerning the acquisition by the Government of your lands, in respect to this option?

A. You mean with Mr. Schaar?

Q. Yes.

A. Well, I would say he was up there three or four times. I just wouldn't be quite positive.

Q. And the matter was discussed, then, on three or four different occasions?

A. Yes, it was. We told him the land wasn't for sale, we had never offered it for sale, and we was just simply making this compromise in order to keep out of court, and he promised us if it did come to court all of this proceedings between him and us would be strictly confidential, it would never be made public.

Q. Now, Mrs. Hayes, you say that you didn't want to sell. If you didn't want to sell, why did you sign the papers? [12]

A. For this reason: The Government had filed these condemnation papers, and he said we would lose it anyway, the Government would get it, and he thought it would be better to compromise rather than have it go to court.

Q. You say he said the Government would get it?

(Testimony of Mary I. Hayes.)

A. Well, they would take it, yes; they would file this suit and they would get the lands.

Q. And you said something about another program he had regarding other persons. Will you tell us, as fully as you can, what was said?

A. Well, he said he had talked with several of them and he felt very favorable that he going to get a compromise from all of them and there would be no trials in court.

Q. And did you believe that?

A. Certainly I did.

Q. Was anything said by either you or Mr. Hayes, your husband, concerning the question as to whether or not you wanted to sell?

A. We told him very plainly that our land was not for sale and never had been; we had owned that land ever since 1910 and had had lots of chances to sell it and if we had wanted to sell it we would have sold it years ago.

Q. Mrs. Hayes, in connection with these conversations you had, was anything said about your attorneys?

A. Yes, there was. We told him we didn't want to sign anything unless it was favorable with our attorneys, we didn't want to [13] do anything against their wishes or that would make them mad.

Q. And then after you first talked to Mr. Schaar did you write a letter to Mr. McCulloch concerning the matter?

A. Mr. Hayes did. That was the understanding

(Testimony of Mary I. Hayes.)

between him and Mr. Schaar, that Ted would write to Mr. McCulloch and see what he said about it.

Q. And did Mr. McCulloch answer that letter?

A. He did.

Mr. Hicks: May I have this marked.

(The letter referred to, so produced, was thereupon marked for identification as Defendants' Exhibit 3.)

Q. (By Mr. Hicks): Is Defendants' Exhibit 3 for identification a letter you received from Mr. McCulloch in response to Mr. Hayes' letter?

A. Well, I suppose it is, but, Mr. Hicks, I never read it. Mr. Schaar and Ted did, but I never did, but I suppose that is the letter.

Q. Was a letter discussed by you and Mr. Schaar and Mr. Hayes in these discussions?

A. There was.

Q. But you would not be able to tell whether this is the letter or not?

A. Well, I think it was. It was in regard to the land and the signing of the compromise. I think that is the letter. What is the date of it? [14]

Q. October 1st, 1946.

A. I think that is the letter, yes.

Mr. Hicks: We would like to offer this.

Mr. Boylan: No objection.

The Court: Admitted.

(The letter referred to, so offered and received, having previously been marked for identification, was thereupon marked received as Defendants' Exhibit 3.)

(Testimony of Mary I. Hayes.)

DEFENDANTS' EXHIBIT NO. 3

[Letterhead Edwin D. Hicks]

October 1, 1946.

Mr. M. B. Hayes
Burns, Oregon

Dear Sir:

I am in receipt of your recent letter, reporting an offer to compromise the condemnation case brought against you by the government. Before receiving your letter we had prepared your answer, as we were required to do, and I am sending to you herewith a copy of the answer.

Of course I do not like to tell you not to settle the case, but it is my judgment that you should not.

The offer of \$25 per acre for the lands above the meander line may not be too far off, but in my judgment the lake lands should not be sold for \$12.50 per acre. Personally, I would value the lake lands as high, or perhaps higher than the deeded lands. We are saying in the answer that the lands for all purposes are worth \$50 per acre, and we can produce witnesses who will support our statement. The eighteen years from 1923 to 1941 were years in which the production would support a \$50 per acre value, and besides, lands have gone up in price, or the dollar value has gone down. Lands exactly like your lake lands are selling in the Klamath Falls country for big prices; for \$125 per acre and up. A system of diking or otherwise controlling the water would make your lands worth \$125 per acre.

(Testimony of Mary I. Hayes.)

Think it over, and you will not want to compromise.

I might say also that in my opinion, the government agent was merely trying to get a statement from you as to value. He does not have any power to purchase, nor has he been requested to purchase. The facts are that months ago the "duck people" reported to the Secretary of the Interior that the lands could not be acquired by purchase. The complaint served on you says that the Secretary of the Interior has determined that your lands shall be acquired by condemnation proceedings, and that the matter has been turned over to the Attorney General, who is to acquire the lands by condemnation proceedings. Before the Secretary of the Interior, or any "duck man" can now purchase your lands, it will be necessary for the Attorney General to dismiss the case against you and turn the whole matter back to the Secretary of the Interior. This, of course, is possible, but it is extremely unlikely.

You say in your letter that you considered what the George lands were valued at by the jury. The value of the George lands was as of 1935. You are not now selling cattle or anything for the same as you sold for in 1935. Recently, a stockman told me that he expected to sell his yearlings this fall for about \$130 a head. That is more than twice as much as he secured in 1935.

The offer of settlement is less than \$15 per acre for the entire tract. You can't buy a similar tract anywhere for twice that amount. If you think you

(Testimony of Mary I. Hayes.)

can, just get in the old car and drive around over the state and try.

If you are asking my advice, I think the foregoing statement is my answer.

Respectfully,

J. W. McCULLOCH.

[Endorsed]: Filed Apr. 10, 1948.

Mr. Hicks: Would the Court want to read this before we proceed?

The Court: Yes. Admitted. It may be marked later.

Q. (By Mr. Hicks): Now, Mrs. Hayes, was Mr. Schaar shown a copy of this letter in any of these conversations?

A. Mr. Hayes handed him the letter to read.

Q. And he did read it, did he?

A. He read it.

Q. And did Mr. Schaar say anything to you folks concerning the letter?

A. Yes, he said that he didn't feel that Mr. McCulloch—he didn't tell us to sell it—or to not sell it. He told it in a nice way, but he said that he took it for granted that it would be all right with Mr. McCulloch for us to sign it.

Q. Well, did he give you any kind of advice at all there in [15] connection with this contract,—Mr. Schaar?

A. Why, he always wanted us to sign it. He said

(Testimony of Mary I. Hayes.)

anything to keep it out of court would be better than going to court. Of course, we told him that if we were selling this land otherwise we would ask a lot more money for it, but since the Government was going to take it and it had to go through court we compromised on that basis, in order to keep it out of the court and the expense of the court trial.

Q. I understood you to say that Mr. Schaar told you the Government was going to take the land anyway.

A. Yes, he said they had filed a proceeding to get it.

Q. Did you believe what he told you in that regard?

A. Sure I did. He was a government attorney and I supposed he was representing them truthfully.

Q. Do you remember the circumstances and the time that the agreement between the Government and you two was actually signed by you folks?

A. Well, I couldn't remember the date,—I think it is on there—but I think it is the 8th of October.

Q. I am not concerned about the date, but what happened that day?

A. Well, he was there quite awhile, and of course it was talked about all the time; and we repeated to him again that this land never was for sale, never had been, and we wouldn't sign it at all under any other conditions only to keep it out [16] of court, since the Government was taking it.

(Testimony of Mary I. Hayes.)

Q. Was there any discussion in any of these conversations concerning the damage case?

A. Nothing was mentioned in my presence in the way of a discussion.

Q. Did you ever read this contract before——

A. No, I didn't. I am sorry to say that I didn't.

Q. You were capable of reading, were you?

A. Sure, I could have read it. I simply trusted to what Mr. Schaar said, and I think Mr. Hayes read it. I thought he did, anyway.

Q. But you didn't read it?

A. I didn't. I never have read it.

Q. Before signing it did you see an attorney or anyone to ask advice on it? A. No sir.

Q. Did you sign it on the same day and within the same hour that Mr. Schaar brought it to you?

A. Yes, the last time, yes.

Q. And was that the first time you had ever seen the agreement?

A. Well, it seems to me like there was some mistake or something, and I think Mr. Woodward came back there once. I think there was something wrong, but I just can't recall that.

Q. But did Mr. Schaar bring this to the house with him.

A. The last time he brought it to the house with him. [17]

Q. Was that the first time you had ever seen that contract, that document?

A. Yes, it sure was.

Q. Then was that signed up that same day?

(Testimony of Mary I. Hayes.)

A. That same day.

Q. And did you know at that time exactly what your claim was under the Tucker Act, your suit for damages?

A. I didn't know there was a Tucker Act.

Q. But did you know there was a suit for damages?

A. I knew there was a suit for damages, but you and Mr. McCulloch had full charge of that and I didn't pay any attention to it.

Q. Did you know how much was involved in that suit for damages?

A. No, I didn't, but when I talked to Mr. McCulloch he didn't know what the amount would be, but he said it would be quite a sum, he thought.

Q. And did you know anything about the merits of that claim? That is, as to whether or not it was a good damage claim or not a good one?

A. Well, we thought it was a good damage claim. At the time that flooded us out, one of the attorneys told us, Mr. Ketchum told us—I guess everybody knows he tried to buy it, and we wouldn't sell it to him, and he said, "If you don't sell it to us we will drown you out," and of course that was a good start.

Q. Now, did anyone advise you concerning that Tucker Act or that damage suit before you signed these papers? [18]

A. No.

Q. And state whether or not when you did sign them you knew there was anything in there about the damage case?

(Testimony of Mary I. Hayes.)

A. No, it wasn't discussed between us at all, and naturally I didn't look for it. If I had read the contract I suppose I would have objected, because I didn't know anything about that.

Q. No attorney here in Burns or any place else looked over that contract and explained it to you?

A. Not in my presence, no, or not to my knowledge.

Q. Was Mr. Hayes there at the time the contract was brought to the house? A. Yes.

Q. Did he likewise sign on the same day that you signed? A. Yes.

Q. And were you left a copy of that contract by Mr. Schaar? Did he leave a copy with you?

A. Yes, and we sent that copy to you.

Q. You sent it to us within the last two or three weeks?

A. Yes. We didn't send it to you at the time. We sent it to you as soon as the court convened here at this time. Or was it before?—No, we sent it afterwards. We sent it during the first recess of the court, I guess you would call it.

Q. Now, Mrs. Hayes, after that document was signed by you and your husband did you, a short time after that, have served upon you certain other legal papers in this case? [19]

A. No sir, I did not.

Q. You were not served with an amended complaint?

A. Oh, yes, with an amended complaint, but I

(Testimony of Mary I. Hayes.)

was sick; I was in the hospital and I didn't know anything about that.

Q. Now, have either you or your husband drawn down any of the money that was deposited in court under the Declaration of Taking in this case?

A. No sir, only the one dollar they sent.

Q. Well, the one dollar was given to you for the option, was it not?

A. It came afterwards, yes. We didn't get it that day.

Q. But no money has been drawn down from the registry of the Court? A. No.

Q. Now, did you later notify the Government agents that you did not want to be bound by this agreement that you signed?

A. Well, since this proceedings here they have been notified, yes, since the Judge—I don't know, I wasn't here that morning, but I understood that he ruled that it wasn't legal.

Q. Now, this property is in your name alone, is it not, Mrs. Hayes? A. Yes, it is.

Q. And I understand you paid for it out of growing chickens and turkeys?

A. I did. We bought the place, in the first place, in 1910, [20] and, as everyone knows—or, they didn't know that—we bought it subject to a State mortgage, and, as you all know, the State renews a mortgage every ten year. Well, the first ten years was up, and the next ten years I said, "When it comes due I want to pay it off," and in the meantime Mr. Hayes had been kind enough to go on a

(Testimony of Mary I. Hayes.)

good many security notes and he didn't have the money to take care of those, and I raised geese and turkeys and chickens and butter and I paid the mortgage off, and that is how it came to be in my name.

Q. Now, Mrs. Hayes, have you yourself expressed a willingness to the Government agents to let them keep the money that they had deposited?

A. Well, I offered them the dollar back, and I think Mr. Hayes told them——

Q. Well, you can't tell what somebody else said.

A. Well, I understood that they had been informed.

Q. Are you willing at this time, so that legal proceedings might be dismissed, so the Government can keep their money and you folks keep your land?

A. Yes, we will be only too glad to keep the land.

Q. And did you authorize Mr. McCulloch and me to make that proposition to the Government agents?

A. Yes, I did. Do you want me to state about Del?

Q. Well, if you care to.

A. My son. Of course, he doesn't have any interest in the land, [21] but we work together, and he has bills to pay, and that is why his name was put on the contract. I wanted it drawn so that he could draw the money if anything happened to us,

(Testimony of Mary I. Hayes.)

so he could make this payment on the land he had bought.

Q. Was anything said about talking to an attorney at the time this was signed?

A. Not that I heard of.

Q. Now, was Mr. McCulloch your attorney in the damage case at the time you signed these papers?

A. He was. I never talked to you about it, but I have with him.

Q. Have you ever talked with Mr. McCulloch, either by letter or personally, concerning a settlement of the Tucker Act case?

A. Oh yes, about what he was to get.

Q. No, I mean—probably my questions are confusing you, but was Mr. McCulloch, were either of us, notified, so far as you know, that you and Mr. Hayes, your husband, were undertaking settlement of the damage case?

A. No sir, you wasn't.

Mr. Hicks: I think that is all.

Cross-Examination

Mr. Fuller: May I approach the witness?

Q. Mrs. Hayes, the first negotiations that you had on this, were they not made with Mr. Woodward? [22]

A. I don't think he was the first man there. No, Mr. Schaar came first.

Q. Do you know about when Mr. Schaar came first?

A. Well, I wouldn't know exactly, no, but I think—let's see, October,—it might have been the

(Testimony of Mary I. Hayes.)

last of August or along the forepart of September, somewhere along there.

Q. And at that time did he make an offer to you of what the Government would pay for the land?

A. He did. He offered us \$11,000.

Q. And at that time did you tell him that you wouldn't take that amount?

A. We always told him we wouldn't take it.

Q. Did you suggest an amount that you would take?

A. Well, some way in the compromise, I don't know just how, but they got around to those figures, as long as the Government was going to take it.

Q. But did you first ask for a larger amount?

A. Yes, \$25,000—\$25 an acre.

Q. Twenty-five dollars an acre, or approximately \$25,000?

A. Well, it would have been a little over that, wouldn't it?

Q. Well, a little more, or something like that.

A. Yes.

Q. After these negotiations had been carried on for some time, had you and Mr. Schaar—when I say you, I mean your husband and your son—and Mr. Schaar, representing the Government, [23] compromised on this sum of \$16,000 together with this five-year reservation which the contract provides for?

A. Sure we did, on the understanding that it would come to trial and the Government would get

(Testimony of Mary I. Hayes.)

it anyway, and we was trying to head off the expense.

Q. In other words, you compromised this in order to avoid going to trial, is that right?

A. Yes.

Q. And at that time you agreed that \$16,000 together with this five-year reservation for your use of the upland, together with Special Master Tract 48, was the sum to be paid to you, is that right?

A. Yes sir.

Q. Now, the contract was dated October 19, 1946, and I presume that is the——

A. October 9th.

Q. October 9th, 1946.

A. Well, I would say it was a month or six weeks before that, anyway, when Mr. Schaar came up there.

Q. Now, at the time that you signed this contract, you any your husband and son, you had already received this letter from Mr. McCulloch, had you not?

A. We had, but I didn't read it.

Q. It had been received by you?

A. Yes,—when we signed that? [24]

Q. When you signed this contract you had received——

A. Yes, it had been received and Mr. Schaar read it that day before we signed it.

Q. Up until court first convened here, approximately a month ago, when this matter came up, you were entirely satisfied until that time, were you not?

(Testimony of Mary I. Hayes.)

A. Well, we was never satisfied with the price, as far as that went, and Mr. Schaar knew that.

Q. That may be so. You had no intentions of repudiating the contract until that time, had you?

A. Well, in a way we had, because we never got our money.

Q. Do you know when the money was deposited in court?

A. Well, I found out afterwards it was the 11th of February, but we wasn't notified.

Q. Did you ask Mr. Donegan, an attorney here in Burns, to call me as to when you might receive the money?

A. Well, I don't know who he called first, but I know Mr. Hayes went down to see Mr. McCulloch about the money. When he got there Judge Fee wasn't in Portland, we couldn't get the money, and later then, it was either the last of June or the first week in July, I couldn't just say which, I think Mr. Donegan called you again, or the court, and they was going on a vacation, they wouldn't be back until the 25th of July, so that was all the satisfaction we got there.

Q. Who was going on a vacation? [25]

A. Well, I don't know who it was, the Court or whoever Mr. Donegan referred to, and he said if we could get there the next day we could have a settlement. Our car was in the garage and it was out of the question.

Q. If I remember aright, the Court was leaving on that day.

(Testimony of Mary I. Hayes.)

A. I supposed it was the Court. I don't know that they were leaving that day, but they were leaving the next day. If we didn't get there by noon, why, no use coming.

Q. The next day?

A. Yes, and this was in the evening.

Q. Did you say Mr. Hayes called on Mr. McCulloch for the purpose of obtaining this money?

A. They did. They went down there, but there wasn't any Judge. They went down to talk it over, anyway. We phoned down there to Mr. McCulloch and Mr. Hicks, and Mr. Hicks says, "Come on down, we will be glad to see you." The money proposition never was mentioned.

Q. When was that?

A. Well, that was the time we went down there. Well, that was before we went to California.

Q. Did they go down for the purpose of getting the money?

A. Well, they expected to if—no, I am mistaken about that date. It wasn't then. It was in April, because I was in the hospital at the time.

Q. April of this year? [26]

A. Yes.

Mr. Fuller: I believe that is all.

Mr. Hicks: I think that is all.

The Court: Just a moment. I understand that you were perfectly satisfied with this agreement if you had gotten your money at the time, is that it?

A. Under the circumstances that the Government was going to take it anyway. If the Govern-

(Testimony of Mrs. Mary I. Hayes.)

ment hadn't been involved in it we wouldn't have thought of selling it for that price, but since the Government had filed these papers or served these papers in the condemnation suit, why, we thought best to compromise, but Mr. Schaar knew that we felt we was selling far below the value, and we told him if we came to court we would ask a different price altogether from what we was compromising for.

The Court: But you understood perfectly that you were getting just so much money for the land, weren't you?

A. Yes, sir, the use of it. We was to get the money within two months, anyhow. When you have bills to meet, sometimes it is worth a little more to you.

The Court: Well, you didn't understand this contract that you signed to say that, though?

A. I didn't read that contract, I am sorry to say. Mr. Schaar knew all about it, and, as I tell you, if the Government will only give us our land back we will be happy.

The Court: Well, you have changed your mind about that, though? [27]

A. Since when?

The Court: Well, you have, haven't you?

A. I say, since when do you think I have changed my mind?

The Court: I am not telling you. I am asking you.

A. No, I haven't changed my mind.

(Testimony of Mrs. Mary I. Hayes.)

The Court: Well, it is certainly obvious that you have changed your mind, because you wouldn't have said that that money was satisfactory at the time and now turn around and try to turn back the written contract.

A. I said this way, it was satisfactory under the condition that the Government was taking it by law and we would have to go through court, and so we just compromised to keep out of court, and we thought we was losing the land anyway.

The Court: All right.

Mr. Hicks: No further questions.

A. Is that all?

Mr. Hicks: That is all, Mrs. Hayes.

(Witness excused.)

Mr. Hicks: Call Mr. Marcellus B. Hayes. [28]

MARCELLUS B. HAYES

one of the defendants herein, was thereupon produced as a witness in behalf of the defendants Hayes and, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Hicks:

Q. Mr. Hayes, can you hear me all right?

A. Yes. Yes, fine.

Q. Mr. Hayes, this contract bears your signature and that of your wife. Do you understand what it is, Government's Exhibit 2?

(Testimony of Marcellus B. Hayes.)

A. Yes, sir.

Q. Now, will you tell the Court, Mr. Hayes, in your own way, the circumstances that led up to you and Mrs. Hayes, or you particularly, signing that agreement. Tell the Court the whole story, just as you understood it.

A. Well, it first started out that we were notified that our lands were going to be condemned, and it drifted along awhile, finally Mr. Schaar and the other attorney at different times came up there and visited the place and wanting to buy this land. In the drift of the conversation they said that they were in line for all the land around Malheur Lake, they wanted to straighten up the reservation, it wasn't our land but all the lands, they wanted all the lands, the Government wanted to own all of it so they could operate it, and it drifted along for [29] quite awhile, and we told them we had bought this land because we had use for it, we had used it all along, for years and years, and it wasn't for sale, and they impressed on us that it was only a matter of time until they would take it away from us at some time and the best thing to do was compromise, and finally Mr. Schaar came up there—I saw him here in town, and he wanted to know along what lines that I would settle on, and so on and so forth, and I made him some prices and he thought they was too high. It drifted along, and finally he offered us \$11,000 for the land. We told him we wouldn't think about that, it wasn't for sale at no price like that, and after a time I

(Testimony of Marcellus B. Hayes.)

told him that the land adjoining us on the west, the George land, was taken over, the deeded land at \$25 and the lake bed at ten, "But," I said, "We have got land there that we have acquired through possession, makes about—the land that we have got patented and the land that we got through having it in our field there forty-odd years makes a little better than a section of land," so we agreed on that at \$25, to take that part of it at \$25 an acre; and, "Well, when is this money going to be paid?" He said it would be paid within a month or two months. We talked the matter all over, and finally we got signed up along that line, and it drifted on until, now, almost a year ago, and we never got a dollar. They never notified us once that the money is down there deposited to our credit or that we could get it in any way. [30] We never got word from any of the officials or anyone that dealt with us, or anyone else, or the Court, as far as that is concerned. We called up at different times down there, and his Honor was back East; later than that had our attorneys down here, Pat Donegan, to call Mr. Hicks and McCulloch about a settlement, to get our money. "Fine and dandy, come down." When we got down there—and when we got down there it seemed like McCulloch was the man that took your place; he was on vacation. Well, Mr. Hicks called up, I think, every man that was up there connected with this case was qualified to settle the case and found that there wasn't. Well, it drifted on from then on, until, oh, I will say six weeks or two months ago,

(Testimony of Marcellus B. Hayes.)

had Pat call up again, and that was along in the afternoon, and he said, "Be here by noon tomorrow, probably we can settle it with you, but the Court is going on a vacation, he won't be here after that time." Well, we was busy, we knew we couldn't get it in that time, so we never have had a dollar out of it. I will take that back. I got a deal through the mail, it was a United States check, and away up in one corner of it it said "While alive". It didn't say anything about what it was for,—I don't know yet what it was for—but naturally I supposed it was to bind that contract. And that is the way it is at the present time.

Q. Now, Mr. Hayes, was that contract signed up on the same day that you first saw it? [31]

A. Oh, I don't know as it was. We was talking around for several days,—and there's one thing, this here damage suit, we never talked damage suit about nothing. Mac took that proposition himself, and it was going to go through court, and had an understanding what he was going to give us out of it, but when we signed up this contract it was on the land and upon rights down there and what the Government agreed to pay us.

Q. Well, didn't you read this contract?

A. Oh, yes, but I don't remember about deeding away any rights or assigning any interest in any rights in condemnation or any damage suit of any kind.

Q. Did you read it clear through, Mr. Hayes?

A. Oh, yes, I think I did.

(Testimony of Marcellus B. Hayes.)

Q. Did you ask any questions about it of anybody?

A. Well, I don't know as I did particularly, because I thought it was along the lines that we had agreed on, and that was satisfactory, we couldn't do any better; but, of course, what we impressed on these lawyers all the time is that this land wasn't for sale. Any person that would go down over the land now and see what preparation we have got there now would readily know that we wouldn't want to sell it.

Q. Did you realize when you signed those papers that the Government would get it at that price?

A. Oh, sure, but we thought by doing that that we would get [32] away from a condemnation. This here condemnation was hanging over it, and when you get into court you never know where you are going to get off at.

Q. Well, didn't you understand, or do you understand, that you still, if you want to avoid going through court, can take the money and let the Government have the land at the price stated in the agreement?

A. Well, it was a little more than sixteen thousand, they give us a five-year lease free,—that is embodied in the contract—and an option on the land if we wanted it. Of course, we would have to pay rental after five years, but the first five years we have the same privilege and the same rights we enjoy there at the present time and the sixteen

(Testimony of Marcellus B. Hayes.)

thousand, with an option on using this land as long as we wanted it.

Q. What I am getting at, Mr. Hayes, it is this, if I follow you correctly, you suggested you were willing to take the sixteen thousand and the five-years' use to avoid going through court under those circumstances? A. Yes sir.

The Court: If that is true, why are we here? Why have you changed your mind?

A. Well, the way it is now, the Government has the land and the sixteen thousand and the whole smear. We haven't got anything. They have never notified us that the money was there. We have heard through different friends once or twice that the [33] Hayes money was there, but they never wrote us a line.

Q. (By Mr. Hicks): Well, now, if you could get the money right away and draw it down from the court, would you want to take the money and let the Government have the land, as provided in that agreement?

A. Well, of course, a fellow would kind of want to live up to his word, but we have got a couple of attorneys in this matter and I would want to consult them about it.

Q. Now, Mr. Hayes, state whether or not Mr. McCulloch and I have always taken the position that you could do whatever you wanted to on this matter, that if you wanted the money, or if you wanted to have the contract in this matter, or any of that stuff that you could—have we left it up to

(Testimony of Marcellus B. Hayes.)

you and Mrs. Hayes, or have we tried to encourage you one way or the other?

A. Oh, you have been fair in the matter. I am not trying to indicate any dishonesty or any deal any place along the line, if we can only get our money, but the Government owes me something during the years that the receivership was there, '37, '38, '39 and '40, had a fair, square contract with them then, they owe me about seven hundred dollars on that and I have talked with different men about that and they said, "Well, get this amount straightened out, we will pay you." They can't take those cattle in there in our field and they can't take them out, and if I would compromise on this I wanted my seven hundred dollars on the grazing field too. Judge Fee here [34] appointed Dr. L. E. Hibbard Receiver there and they sent me a copy, and right at the last clause there whenever this land went through the court and they determined the owner of it, if it was the Government and the Government determined the rightful owner, the money would be refunded back to them, but the money is still down there.

Q. Now, Mr. Hayes, did you and Mrs. Hayes authorize me, as your attorney, to go to the Government people and ask them to keep their \$16,000 so you could keep your land?

A. Yes sir. They also asked me, at the time I was in Portland with Del, to go to the court there and compromise in some manner, get them to release the land, turn the money back and turn our property back to us.

(Testimony of Marcellus B. Hayes.)

Q. Now, you testified, I believe, that Mr. Schaar told you the Government was going to take your property anyway?

A. Under condemnation, yes sir.

Q. Did you believe that?

A. I did, for a fact, and I think they would have to.

Q. And was that one of the reasons why you signed the papers?

A. Well, it undoubtedly was, yes. Of course, we have been in court for years, went through all these local courts and the Supreme Court and the Court of Appeals, and a man that has never followed up these courts and paid the expenses, they don't hardly realize what they are, and I have had all the court I wanted. [35]

Mr. Hicks: I believe no further questions.

Cross-Examination

By Mr. Fuller:

Q. Mr. Hayes, if you could get your money in the next three or four days would you be satisfied?

A. All of it?

Q. All of it. Well, now, I am not talking about the receivership money.

A. When I get the sixteen thousand I want the seven hundred dollars too. That is just as honest as the sixteen thousand is and just as much of a contract.

Q. That was not part of this contract?

A. Oh, no no.

Q. Well now if you could get this sixteen thou-

(Testimony of Marcellus B. Hayes.)

sand within the next three or four days or whenever the Court gets back to Portland to make out a check would you be satisfied?

A. Huh, I would kind of like to talk it over with my wife. I believe I would, though.

Q. You believe you would?

A. If I don't have to go to court no more, but I want all my money; I want the seven hundred dollars—six hundred ninety-two dollars is what it is. But I want these other people to be satisfied. These people have been through court and worked for us all the time, and as long as they have held it up this [36] long, Mr. Hicks there and Mr. McCulloch put in years and years on this case, and I want him satisfied.

Q. I am still back to the same question. I have no control over the receivership money and I haven't all the control over the money in this case, or I haven't any control, but if the Court, upon proper showing here, will direct payment of the \$16,000 at this time, would you be satisfied?

A. Well, I couldn't say that I would. I would want to talk to my attorneys.

The Court: Well, now, just a moment. Is there any argument between you and these attorneys? Are you contesting their fee, like some of the rest of these people down there on the lake?

(At this point an unidentified lady in the audience interjected a remark which was not understood by the reporter.)

The Court: Just a moment. Are you contesting

(Testimony of Marcellus B. Hayes.)

the attorneys' fees, the way some of these people on the lake are? A. No sir, none whatever.

The Court: You are not?

A. No. There is no question about our settlement, as far as I know.

The Court: Well, all right, I will ask the attorneys, have you any objections to their carrying out their contract?

Mr. Hicks: Not at all, your Honor, and I will take the stand—I mean I have objection. I leave it entirely up to [37] them, as I have on various occasions, for them to decide it; nor have we undertaken to urge it one way or the other.

The Court: All right. It is up to you, Mr. Hayes. Do you want to take this or don't you? That's the size of it. I will give you time to talk to your attorneys and your wife.

A. All right, Judge, that is fine.

The Court: And at the end of that time you make up your mind. A. I will let you know.

Mr. Hicks: The Court can sit in on the conference, as far as I am concerned.

The Court: Court is in recess.

(A recess was thereupon had, and thereafter proceedings herein before the Court and in the absence of a jury were resumed and continued as follows:)

The Witness: Do I have to swear again?

The Court: No.

(Testimony of Marcellus B. Hayes.)

Redirect Examination

By Mr. Hicks:

Q. Mr. Hayes, since the recess have you talked this matter over with Mrs. Hayes?

A. Yes sir.

Q. Now, do you want to keep your land or do you want that \$16,000 that is in court?—And you understand these cases [38] are sort of pending anyway. Now, what do you want to do about it?

A. Well, of course, given my choice, I would sooner have my land. I have got our setup and our land and our winter quarters and everything there, that's worth more to us than the sixteen thousand, and I figure that if the sixteen thousand is the best we can do I would sooner have that. We have several tons of hay down there now ready for the cattle to be turned in on, and the way the price of cattle and hay is that is no price for the property, but to say this is a matter of law, and the location of it, that is the only thing I was figuring on.

Q. The Court wants to know what you want to do about it.

A. You want a definite answer, do you, Judge?

The Court: Yes, I want a definite answer.

A. Well, would there be any show for us to keep this property and hold it all?

The Court: Well, as I understand it, you have been trying to get this money and you have been blaming it onto the Court that you didn't get the money. Actually, the money has been down there since the 10th of February, and I was present in

(Testimony of Marcellus B. Hayes.)

the jurisdiction from the first of May on, and I don't know why you didn't get it.

A. Well, I was never notified, of course, of the money being there, but, to give me the choice between the land and the sixteen thousand dollars, I would sooner have the land. [39]

The Court: Yes, I know now, but you once entered into a contract.

A. I understand that, too. Well, that is just the way I feel about the matter. Of course, if that contract is binding and you can hold me to it, why, you can't get away from it, but I would like to have—I just don't know what to say about it. Supposing they turned this back to me, could they turn around and condemn this land and take it away from me?

The Court: Yes, I don't think there is any question about that part of it, if the Government chose they could condemn any piece of land in the country if they had proper use for it.

A. Well, would you have authority to let us go on this land and let us operate it the way we have for the last forty years and let it rest the way it is now?

The Court: No, I haven't any such authority. I have only authority to decide proper questions that they put up to me, and you can't even give me an answer yourself.

A. Well, the only thing is, we signed this contract.

The Court: Yes; and I think since you have seen these other verdicts, and from the fact that

(Testimony of Marcellus B. Hayes.)

they turned this land back, that you think there is a different setup than there was at the time you signed the contract.

A. Oh, no, I know about the contract. We signed it, and I know why we signed it, and all that, but if I could get the land and let the money go I would take the land. [40]

The Court: Well, of course, you understand nobody can assure you how long you are going to keep it. The Government may file another condemnation case tomorrow, as far as that is concerned. You understand that?

A. That is putting me kind of on the spot. Well, don't you think there is any possibility of us holding this land at all?

The Court: I have no idea about it. I am not here to give you advice, Mr. Hayes.

A. Well, I am just—that is just my thinking, that is the way I feel about the matter, and, of course, if there is no such a thing as getting possession of the land again, why, I will have to abide by the contract, that is all.

Mr. Hicks: All right,—does the Court have any further questions from him?

The Court: No.

Mr. Hicks: That is all, Mr. Hayes, thank you,—oh, did you want to ask him questions?

Mr. Fuller: I might ask him some further questions.

Mr. Hicks: Oh, sure. I thought you were all through.

(Testimony of Marcellus B. Hayes.)

Recross-Examination

By Mr. Fuller:

Q. Mr. Hayes, I will ask you the same question now: Providing that you can get the \$16,000 together with the money that is in this receivership fund, within the next few days, would you now be satisfied? [41]

A. Well, I wouldn't be satisfied, particularly satisfied, but if that is the best that could be done, if that is the best settlement we can get at, why, of course, I would abide by it, but if you give me the choice what I would sooner do, I would sooner have the land. Anyone that goes down through that land and goes down and sees that herd of cattle and the way we have the winter setup there, they would say keep the land and the hay and everything else.

Q. Under this contract you would have the use of this land for the next five years without any charge, wouldn't you? A. Yes, sir.

Q. So you can use the hay and the pasture on there and run cattle on there for the next five years? A. Yes.

Q. At the time you signed the contract you were willing to go through with this contract, were you not? A. How is that?

Q. At the time you signed the contract, you and your wife and your son, you were willing to go through with the contract at that time, were you not?

A. Knew the nature of the contract?

(Testimony of Marcellus B. Hayes.)

Q. No; were you willing to go through with it at that time?

A. Well, under the circumstances, these papers, the condemnation papers, were hanging over us, and the idea was to get out of the court, get out of the way of them condemnation cases. [42]

Q. In other words, you wanted to compromise your claim with the Government for sixteen thousand together with this five-year reservation, is that right?

A. Well, we wanted to compromise. It wasn't because we wanted to do it. It was to get out of court.

Q. In other words, what you wanted to do with the Government was compromise this case for the amount the contract set forth at that time?

A. Yes, sir.

Q. And you never changed your mind about it until just when we first came down here this term of court, is that right?

A. Oh, no. As far as our minds, we never did want to sell the land, but as far as changing—

Q. But did you ask to repudiate the contract until that time?

A. No, sir.

Q. And you would have accepted the money had proper application been made for the money at the time that you requested either Mr. Hicks or Mr. Donegan—if the money had been paid over to you, you would have accepted it, would you not?

A. We would at the time, yes.

Mr. Fuller: I believe that is all.

Mr. Hicks: That is all, Mr. Hayes.

(Witness excused.)

Mr. Hicks: We will call Mrs. Hayes. [43]

MARY I. HAYES

one of the defendants herein, was thereupon recalled as a witness in behalf of the defendants Hayes and, having previously been duly sworn, was examined and testified further as follows:

Direct Examination

By Mr. Hicks:

Q. Now, Mrs. Hayes, you know what this other contract is about now and what you want to do, do you? A. I do.

Q. Well, will you tell the Court, in your own way, now, what you would rather do?

A. I would rather have the land back.

Q. Do you or do you not want to be bound by that contract that you signed?

A. No, I don't want to be bound by it.

Q. You want your land back?

A. I want the land back. I would much rather have the land back.

Mr. Hicks: Does the Court have any questions?

The Court: Well, as a matter of fact, you did change your mind when you found that these verdicts came in and then the Government decided not to take the land, didn't you?

(Testimony of Mary I. Hayes.)

A. Well, as far as changing my mind, my mind has never changed. We never wanted to sell the land in the first place. [44]

The Court: Well, you signed the written contract.

A. We signed that, as I told you,—Mr. Schaar told us that the Government would get our land anyway; these condemnation cases had been filed, and of course we thought we were going to lose our land, and it doesn't seem to me that the Government went on as Mr. Schaar represented to us that they would. I think he misrepresented it, and I think I signed that contract under misrepresentation. That is the way I feel about it. If he had said, "If this land goes too high the Government will give it back to you, we wouldn't take it," well, we would have said there it goes, we wouldn't have signed anything. That is how that was. But he didn't explain that to us. I suppose he knew that.

The Court: Anyone want to examine?

Cross-Examination

By Mr. Fuller:

Q. This misrepresentation that you refer to, what you mean by that is that if the verdict went too high that you would not be bound by the contract, is that it?

A. No, sir, like them other cases here, if he had told us that, "If this goes too high and the jury brings in a verdict of too high you would get your land back, the Government wouldn't take it," we would have said, "Good enough."

(Testimony of Mary I. Hayes.)

Q. He didn't tell you that the Government wouldn't take it?

A. No, he didn't tell us that. [45]

Q. At that time did he know that the Government was going to dismiss these cases?

A. I don't know what he knew.

Mr. Fuller: I think that is all.

Mr. Hicks: No further questions.

(Witness excused.)

Mr. Hicks: Call Mr. Boylan for just a few questions. [46]

BERT C. BOYLAN

was thereupon produced as a witness in behalf of the defendants Hayes and having first been duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Hicks:

Mr. Hicks: May I have the original file, your Honor?

Q. Mr. Boylan, you are one of the attorneys representing the United States in this particular condemnation proceeding? A. That is right.

Q. And did you or one of the attorneys in your office prepare a form of complaint, the original complaint, which was filed in this proceeding, Case No. 3124, United States vs. Bell Hayes and Marcus B. Hayes?

A. I believe Mr. Fuller prepared that complaint.

(Testimony of Bert C. Boylan.)

Q. Yes. Now, the United States Attorney's office had the jurisdiction in respect to the condemnation proceedings; is that correct, Mr. Boylan?

A. I am not—I assume that that is correct, although I am not just positive about it.

Q. Well, I mean you were in charge of the litigation that was pending?

A. The Lands Division was charged with the condemnation proceeding, and at the present time the Lands Division is a part of the United States Attorney's office.

Q. Yes, but this case was in the office of yourself and Mr. [47] Fuller, in Portland, and was being processed and prosecuted by you gentlemen in behalf of the Government, was it not?

A. That is right.

Q. Now, state whether or not, Mr. Boylan, for a period of approximately two years last past, at various times I did not protest to you concerning the practice of Mr. Schaar in talking to our clients in trying to arrange settlements with them without consultation with us?

A. You spoke to me on several occasions, I think once over the phone and possibly once or twice in person, and accused representatives of the Fish and Wildlife of what you said was improper procedure in attempting to secure a settlement of cases in agreement as to the price that would be paid for the land. That is true, you did, on a few occasions, make such statements to me.

Q. And did I, on or about the month of May

(Testimony of Bert C. Boylan.)

last year, have a meeting with you in which I discussed with you a session I had had with Mr. Tom Clark, the Attorney General of the United States, and particularly Mr. Edward J. Williams, I believe his name is, in Washington, who was then in charge of lands acquisition in behalf of the Attorney General?

A. I knew that you had made a trip to Washington, or at least you told me you were going, and later on sometimes, I don't remember the date, you told me that you had called on Tom Clark, the Attorney General, and also that you had had a talk with [48] J. Edward Williams, who was then, I believe, the acting head of the Lands Division.

Q. Did you advise, or you, Mr. Boylan, authorize Mr. Schaar to settle anything in connection with this pending lawsuit and the other case pending under the Tucker Act? A. No.

Q. To your knowledge, there was a case between the same parties, that is, the Hayeses as plaintiffs and the United States as defendant, under the Tucker Act, which was then pending?

A. I believe there is such a case, yes.

Q. And you had not authorized, as I understand, Mr. Schaar to take any steps to settle that case? A. No.

Q. And you had not authorized Mr. Schaar, or yourself or your office, so far as you know, to contact the clients and to arrange terms of settlement pending lawsuit? A. No.

Mr. Hicks: I think that is all, your Honor.

(Testimony of Bert C. Boylan.)

A. Is that all, Mr. Hicks?

Mr. Hicks: I would like to offer at this time the original complaint in condemnation, and also the last amended complaint and the reply, as exhibits. It may be they are in the record anyway, your Honor. I would like to have leave to substitute copies for the originals, if they may be received in that form.

The Court: Yes. You don't need to mark them, but you may [49] note them.

(The documents referred to are here designated in this transcript as follows:

(Complaint in Condemnation in the instant case, Civil No. 3124, filed April 22, 1946, is designated received as Defendants' Exhibit 4;

(Second Amended Complaint in Condemnation in the instant cause, Civil No. 3124, filed February 13, 1947, is designated in this transcript received as Defendants' Exhibit 5; and

(Reply to Answer of Defendants Bell Hayes and Marcellus B. Hayes in the instant cause, Civil No. 3124, filed September 11, 1947, is designated in this transcript received as Defendants' Exhibit 6.)

Mr. Hicks: That is all, Mr. Boylan, thank you.

(Witness excused.)

Mr. Hicks: That is all, your Honor. [50]

Mr. Fuller: Call Mr. Woodward.

DOREN E. WOODWARD

was thereupon produced as a witness in behalf of the plaintiff herein and, having first been duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Fuller:

Q. Mr. Woodward, by whom are you employed?

A. By the Fish and Wildlife Service of the United States Department of the Interior.

Q. And here in Oregon?

A. I headquarter in Oregon, yes.

Q. Are you acquainted with Mr. and Mrs. Hayes that have just been on the stand here?

A. Yes sir.

Q. Did you at any time have any negotiations with them relative to the settlement of the claim for their lands?

A. Yes sir.

Q. When were those negotiations first carried on, if you know?

A. I don't know for sure when the first negotiations were carried on. I undertook them personally in the late summer of 1946.

Q. Where did these negotiations take place?

A. At the Hayes residence, north and a little west of Burns here. [51]

Q. What took place, just in your own words explain what went on, at this first conference, if you remember?

A. Well, I had gone to the farm to contact Mr. and Mrs. Hayes and their son, and, as I recall, I

(Testimony of Doren E. Woodward.)

arrived there about four o'clock and they were all absent, one of the men there, Mr. Don Otley, said they would be back shortly. So I sat there in the yard and talked to Mr. Otley until they returned, which, as I recall, was around five, and we went into the house and discussed the Hayes land at considerable length. The fact that there was a condemnation action pending against the land was discussed, and I indicated that that suit showed the intention of the Government to acquire the title. We discussed the possibility of compromising a settlement, in order that a lawsuit could be avoided, that is, the cost and time of a court action. As I remember, their original asking price was around \$21,000 and I offered them, I believe, \$12,500, and we discussed it further solely from the standpoint of "Can we compromise our difficulties and settle the entire situation on the lake?" And we eventually arrived at a compromise figure of \$16,000 in cash and five-years use of the Special Master or Lake bed Parcel 48 and the upland. It was agreed that I did not have authority at that time to accept such a compromise, and they wanted to discuss it with their attorneys. Then I left shortly after, with the understanding that they would write to Mr. Hicks and McCulloch and I would write to our Chicago [52] or central office and see if those terms were acceptable to them, and shortly before I left the house I indicated to them that we would like in that settlement to include the claims under the Tucker Act so that we could clear up all phases of our troubles on Mal-

(Testimony of Doren E. Woodward.)

hour Lake and square the thing away, and they indicated that was satisfactory, that when they were through with it they were through with it. I believe that I telephoned Chicago as to the results of that conference, but in any event, approval was granted to settle on those terms, and, since Mr. Schaar was coming into Central Oregon on other business, he took over getting the actual execution of the agreement with the Hayeses.

Q. You had no further dealings with them after that time?

A. Yes,—not personally, but when the agreement first came in I was not satisfied with the precise wording of the reservation of the five-years use. I felt that it might lead eventually to difficulties from misunderstandings,—while the Hayeses and ourselves and Mr. Schaar understood each other, we couldn't be sure that everybody would be around five years,—so it was reworded and the original agreement was sent back to Mr. Schaar and he was requested to contact the Hayeses and get them to initial the revised pages, which he did, and it was returned and sent to the central office in Chicago.

Q. That was revising the special provisions?

A. It clarified them. It didn't expand them any.

Q. Did you have any further dealings? Did you have anything to do with the signing of it?

A. I was not present when it was executed, no.

Mr. Fuller: I believe that is all.

(Testimony of Doren E. Woodward.)

Cross-Examination

By Mr. Hicks:

Q. Now, Mr. Woodward, does Mr. Schaar work under your directions? A. Yes sir.

Q. Are you sort of top man in that setup?

A. I am so designated, yes.

Q. I want to ask you, Mr. Woodward, whether or not Mr. Schaar had authority to tell the Hayeses that the United States was going to acquire this land in any event and that if they did not settle with the Government the Government would condemn and acquire the lands?

A. In my opinion, Mr. Schaar would never make such a statement.

Q. I am asking you whether or not he had authority to make that statement?

A. He had no such authority and he well knows it.

The Court: That has been the Government's position for twenty years, hasn't it?

A. Yes sir. They are very strict on that.

Q. (By Mr. Hicks): Now, Mr. Woodward, you yourself knew that Mr. McCulloch and I had been representing these people for [54] about—well, I for about seven or eight years, Mr. McCulloch for about ten, did you not, in all this litigation?

A. I knew that you had represented the lake bed owners in the U. S. versus Otley 1601 case.

Q. Yes; and didn't you know that we were representing the Hayeses?

A. I had no specific information that you were

(Testimony of Doren E. Woodward.)

going to represent them here. There had been no answer filed, in so far as I knew.

Q. And that the Hayeses said they wanted to get in touch with me?

A. They wanted to discuss it with you, that is correct.

Q. So you did know that we were their attorneys at all times?

A. I repeat what I said before: We knew you represented them in the 1601 case, and they said they wanted to take it up with the attorneys, and we agreed to that.

Q. Did I understand that you said that you agreed that you would give these folks \$16,000 and five years' use of the land? Was that your statement?

A. I am not sure that I understand your question.

Q. In your direct testimony, as I understood it, you said you agreed you would pay them \$16,000 and give them five years' use of the land under this clause that you mention; is that right?

A. No, not all the land. That is important. It is Lake bed Tract 48 and the upland. [55]

Q. Well, it is the tract that is mentioned in these proceedings?

A. No sir, it does not include all of them.

Q. Well, the point I am getting at is that after you had agreed to the price and everything you said that just as you were leaving you said something about the Tucker Act cases.

(Testimony of Doren E. Woodward.)

A. Before I left, yes.

Q. And asked them if they would consider that in?

A. I told them I would like to include it and they did not object.

Q. And that was after all was settled as to the value that should be paid for the land?

A. That was a compromise.

Q. And you mentioned that to them just as you were leaving?

A. Well, I don't think I was standing with my hand on the door, Mr. Hicks. As I recall, it was just before the negotiations broke up.

Q. Did you know that Mr. McCulloch and I were representing these parties on the Tucker Act cases?

A. I knew there was a Tucker Act case filed, yes.

Q. You knew that we were their attorneys in that case, didn't you?

A. I will say this, I understood that you and Mr. McCulloch had filed at suit. [56]

Q. Well, did you ever obtain authorization from the Attorney General of the United States or from any governmental official authorizing you to negotiate settlement of the pending lawsuit, to wit, the Tucker Act case?

A. No, it didn't occur to me that it was necessary.

Q. You didn't get any authority?

A. No sir.

Q. And, so far as you know, there never was

(Testimony of Doren E. Woodward.)

any authority given by the Attorney General's department or any other governmental agency for settlement of that pending lawsuit?

A. In so far as I know, no direct authority.

Q. Now, is this practice of settling lawsuits without regard to the attorneys who represent the clients, is that an established and recognized practice in your department?

A. We often—I don't say, perhaps not often, but occasionally reach an agreement with land owners who are represented by attorneys after a suit is filed.

Q. Either before or after? A. Yes.

Q. The pendency of the suit does not seem to make much difference about your settling with them? A. Not in all cases.

Q. And when you get them to agree to terms you usually handle the matter by wire so you can get them signed up pretty fast, is that right, Mr. Woodward? [57]

A. No, that is not correct.

Q. I understood you to say that you wired this one through, like you did the Dunn one?

A. I think in this case I telephoned.

Q. Oh, you telephoned. That is even faster than wire. A. Well, it is more satisfactory.

Q. Did you get the authorization right away?

A. They asked me to present the facts and they would make a ruling.

Mr. Hicks: That is all.

Mr. Fuller: That is all.

(Witness excused.)

Mr. Fuller: Call Mr. Schaar. [58]

ROLAND SCHAAR

was thereupon produced as a witness in behalf of the plaintiff herein and, having first been duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Fuller:

Q. Mr Schaar, by whom are you employed?

A. By the Fish and Wildlife Service.

Q. In what capacity?

A. Land valuation **engineer**.

Q. Are you acquainted with Mr. and Mrs. Hayes, the parties of whom we are speaking here in this proceeding?

A. Yes, I know them.

Q. Did you have anything to do with the carrying out or negotiating of this contract we are talking about herē, this Government's Exhibit No. 2?

A. The only thing I did with it was have it prepared and then finally executed.

Q. You had it prepared?

A. Yes.

Q. And where was that prepared?

A. Prepared right here in Burns.

Q. And was it delivered to Mr. and Mrs. Hayes?

A. Oh yes, I delivered it personally.

(Testimony of Roland Schaar.)

Q. And did you discuss it with them at the time?

A. Why, yes, we went through it in detail, and Mr. Hayes [59] reviewed it, read it, Mrs. Hayes took the forms, and how carefully she read it I don't know, but at least she took them page by page; and their son Delbert also did the same; and we discussed the contract.

Q. Did they sign the contract at that particular time?

A. Now, let's see, I got out there, it must have been about six or seven in the morning,—it was rather early—and we discussed it. I imagine it was about ten o'clock before they signed the contract.

Q. You had nothing to do with the negotiating of the figure that is set forth in the contract, did you?

A. Not the one that was finally used in the contract that Mr. and Mrs. Hayes agreed to.

Q. Had you discussed a settlement with them at some other time?

A. Oh, yes, I had seen him before that time, talked to Mr. Hayes more than the others; and one other time I was out there with Mrs. Hayes there and told them what I thought it was worth.

Q. Who returned the contract to you, if it was returned to you?

A. It was sent back to me by Mr. Woodward. The reason for that was to clarify the wording—

Q. No, I mean after the Hayeses signed the con-

(Testimony of Roland Schaar.)

tract, who sent it back to you or how did you obtain possession of it again? [60]

A. Oh, I took it right with me, with Mr. Delbert Hayes, in to town with him.

Q. And he had it notarized?

A. Yes, and he had it notarized.

Q. After you got it was it sent to anybody for acceptance?

A. It was sent to our Portland office, to Mr. Woodward, for review and transmittal to our central office.

Mr. Fuller: That is all.

Cross-Examination

By Mr. Hicks:

Q. Mr. Schaar, state whether or not in this conversation or other conversations you had had with the Hayeses you told them that the Government was going to acquire this land in any event?

A. No, I didn't say it that way.

Q. You didn't say anything that even meant that or suggested that?

A. Oh, I did mention that the land was up for condemnation.

Q. And did you give them any advice there, Mr. Schaar? Did you give them any advice?

A. No, I don't recall giving them advice.

Q. Didn't you tell them it would be better for them to sign the papers?

A. Well, I don't recall as to telling them that.

Q. Did you tell them that they would be better

(Testimony of Roland Schaar.)

off, they had [61] better sign the papers, that the Government was going to get the land anyway?

A. No, that would not be up to me to say. That was up to them to make up their minds in selling.

Q. Now, you had negotiated with Mr. McCulloch previously on this land and other lands on Malheur Lake?

A. Well, I had never negotiated. What happened there, Mr. Dillard had suggested that I talk to Mr. McCulloch to find out about these Malheur Lake cases. Well, I did that and I wasn't there more than fifteen minutes and, as far as I was concerned, it was a little embarrassing.

Q. What do you mean?

A. Well, I could see within fifteen minutes that I was just getting one picture of it, one side of it, obviously the way Mr. McCulloch wanted me to see it.

Q. Well, you knew Mr. McCulloch was representing the Hayeses at the time you took the contract out there?

A. Oh, yes, they had been in touch with him. They had written to him.

Q. They showed you a letter they had gotten from him?

A. Yes.

Q. You read it?

A. I did.

Q. And you told them it was all right for them to go ahead and settle? [62]

A. Well, now, let's get that straight. No, I didn't.

Q. I am just asking you.

A. No, I didn't.

(Testimony of Roland Schaar.)

Q. What did you tell them after you read it?

A. Mr. Hayes—after I read it I sat there and thought a minute, and Mr. Hayes said, “Well, the way we interpret this thing is we shouldn’t go ahead and sell this thing,” and I said, “Well, Mr. Hayes, it is up to you to make up your own minds.”

Q. Those are about the exact words, aren’t they?

A. As near as I remember.

Mr. Hicks: No further questions.

Mr. Fuller: That is all.

The Court: Why didn’t you submit this contract to the attorneys for the parties?

A. Well, they told me that they were to settle with their attorneys.

The Court: No, but why, before you permitted them to sign such a contract as this, didn’t you submit it to their attorneys? You knew that they were represented.

A. Well, I supposed it was all right, since Mr. and Mrs. Hayes and their son had agreed to it.

The Court: You didn’t know that that would be unethical if you were dealing for a private party, did you?

A. No, I hadn’t any intention to be unethical.

The Court: Well, you just didn’t know that it was unethical, is that it?

A. Well, I didn’t look at it that way, your Honor.

The Court: Do you mean to say that when you know that people are represented by lawyers in a

(Testimony of Roland Schaar.)

lawsuit you do not feel that there is any necessity of dealing with a lawyer instead of the client?

A. Well, I will answer it this way, your Honor, that they had been in touch with their attorney and that they felt that it was all right to go ahead and do that.

The Court: Yes; but then do you submit to them and let them on their own hook sign up the written contract, they having explained it to their attorney to your knowledge, settling the lawsuit, settling two lawsuits, both pending in court? You don't think that is unethical?

A. Well, at that time I didn't, your Honor.

Mr. Hicks: I would like to ask him one other question—Are you through?

The Court: All right.

Q. (By Mr. Hicks): Mr. Schaar, you knew the condemnation case was pending, did you, in Portland at the time you signed these folks up?

A. There were papers out for condemnation.

Q. And you understood Mr. Fuller and Mr. Boylan were representing the Government in that proceeding? [64]

A. Yes.

Q. And you did not consult with them and get authorization to settle this matter with these people without consulting us, did you?

A. I didn't talk to them, no.

Q. And the same with the Tucker Act case, which you knew all about, is that right? You just went ahead on your own, without——

(Testimony of Roland Schaar.)

A. Well, I didn't make this deal. This wasn't my deal. I didn't make the deal. All I did was, I went back there and got the form and had them signed up.

The Court: Well, the contract was signed up the same day that you took it out there, wasn't it?

A. That is right, but I mean the preliminaries, the terms, were reached before I went back there.

Q. (By Mr. Hicks): But the contract was prepared in Burns the day before you took it out there, was it not? A. That is right.

Q. And the next day you took it out and signed them up on the one session, is that right?

A. Oh, there was only one session as far as the signing was concerned, there was only the one session on the signing.

Q. Did these elderly people ask you any questions concerning that contract before they signed?

A. Oh, yes, as far as I remember, they did.

Q. Do you remember one single question they asked you about? [65]

A. I believe they asked me about the reservation, about the wording of it, as they wanted it understood in such a way. We discussed that.

Q. That was in respect to the manner in which the contract itself was written, is that right?

A. That is right.

Q. Now, one other question: Your main office is in Portland, isn't it? A. That is right.

Q. You spend most of your time in Portland?

A. Oh, I don't know, I wouldn't say most of the time.

(Testimony of Roland Schaar.)

Q. Well, you spent probably fifty percent of your time in Portland, and were in and out of there the whole while while there negotiations were under-way, weren't you, Mr. Schaar?

A. Well, not a great deal, but there—there are six states in this region that we have to cover, too.

Q. And your office there in Portland is in the Weatherly Building? A. Yes.

Q. That is about a mile from the Yeon Building, where Mr. McCulloch and I have our offices?

A. Yes sir.

Mr. Hicks: I have no further questions.

Mr. Fuller: That is all.

(Witness excused.) [66]

Mr. Fuller: That is the Government's case, your Honor.

The Court: Well, there is a neat balance here. As far as the Court is concerned, I think these people have unquestionably changed their minds, notwithstanding their testimony. I think they were perfectly well satisfied and would have taken this money and accepted this contract at any time up until the first verdict came in in these cases, then they thought that there was a chance to capitalize on them, and that is their status. But it is true that the Government repudiated the first verdict in the cases and thereby changed the whole course of the proceedings, because the Government has promised these land owners, has promised this Court, on record and privately, for a good many years, that they were going to take this land without any question,

and for a long time this Court tried, by suggestions in open court, to have the Government file declarations of taking. But the Government did not do that, and the Court on several occasions has considered the question of whether the Court would not order the dismissal of these cases if declarations of taking were not filed.

Now, this proceeding in this case, the signing of this contract, does repudiate the whole basis that the Government has gone on for a good many years, and, whether these agents of the Government directly promised these people or not or represented for the Government that the Government was going to take this land in spite of everything, I think that the [67] representation was made by the circumstances and by what had been said in court and out of court for a good many years. I am not casting any blame on the attorneys for the Government who are presently representing it, but the Department does have some responsibility and there are some people in the Department who have been cognizant of this situation all the time that I have. So I think that that representation was made and I don't think it was carried out, and I think it was one on which they have some right to rely. That is the first one.

Then, in the second place, I think that the action of the agents of the Government is entirely and absolutely unethical. The Court would not permit the agents of an insurance company to go around and negotiate a settlement behind the back of attorneys who were employed to represent plaintiffs, and I

think that the same type of ethics prevails in the trial of litigation in which the Government is involved.

Now, this situation is entirely different from the one that was tried the other day, because here there is no question about the fact that this condemnation case was sued and the Government was fully cognizant, as everybody else in this situation was, that McCulloch and Hicks were presenting these people, and there can't be any doubt about it, and if they hadn't known it before they knew it at the time they asked to consult Mr. McCulloch about it. Mr. McCulloch's letter is definitely against it, although he doesn't say that they can't [68] do it,—of course you don't say that to your client—but, obviously enough, it seems to me that he was expecting to receive some notification from these people and perhaps have a chance to see the contract, and the contract settles not only this litigation but settles another case.

I don't think it is possible that any court is going to allow that sort of thing to be carried along in a situation of this sort. I absolutely exonerate the Special Assistants to the United States Attorney, because the testimony clearly shows that they were not involved in any way, but the agents of the Government who negotiated this settlement are absolutely bound by the same limitations as were the Special Assistants to the United States Attorney, except that they are not attorneys of this court. If they were I would put them before a discipline committee promptly.

So the only thing the Court can do now is to restore the status quo. That is what I am going to do. I will not present this contract to the jury as a measure of the damages in this case. Now, I couple that with an offer upon the part of the Court to set aside the Declaration of Taking, because the Declaration of Taking is an integral part of this transaction and was not filed, I understand, until they had the contract, which set the price, so, therefore, if the Government makes the motion I will set aside the Declaration of Taking. [69]

Mr. Hicks: Could I propound a question, your Honor?

The Court: Yes.

Mr. Hicks: If the Declaration of Taking is set aside, then could it be understood that if the trial proceeds, if we have to try the question out, that the Government should do so upon either this Declaration or another one, so that we won't have the same thing happen here as did in the previous cases?

The Court: Well, I am no seer with the crystal ball. I have no idea what the Government is going to do and I am not going to answer questions in advance.

Mr. Boylan: May it please the Court, at this time we would like an exception to the ruling of the Court on the contract, and, as far as a motion for the purpose of setting aside the Declaration of Taking is concerned, I am not authorized to make such a motion. I will do this: Tomorrow morning early I will call the Attorney General, apprise him of the situation, and ask him for instructions as to that

matter, but I feel at this time that I am authorized to make such a——

The Court: Well, this is a preliminary trial and, as far as the Court is concerned, this may not be necessarily a definite ruling, but if you offer the contract tomorrow before this jury I am going to take what measures are necessary then to say what will be the conclusion of the Court, and I give you warning of what it will be. I think probably this is not [70] conclusive at this time, but I think it will be raised on a condemnation suit whenever you offer the contract as setting a measure of value. But you may have an exception in so far as it is necessary at this time, and otherwise than this the case will go to trial, and if the Declaration of Taking is not set aside then the verdict will be binding, because if I start to try this case on this Declaration I will consider the verdict is an absolute carrying out of the intention of the Government to take the land. In other words, if you leave that Declaration of Taking standing, in the face of this ruling, I will consider the judgment final, whatever the amount is that is set by the jury.

Mr. Boylan: You Honor, might I stress that I don't know just how early I can get hold of the Attorney General. I will try just as soon as the telephone office is open in the morning, and in case I don't get him by nine o'clock I would like to have a little time in which to try to get him before starting in the trial.

The Court: I will try not to embarrass you, Mr. Boylan. Of course, this case is set for trial and I

have to regard my situation as I can. I have some other things to do in the morning, that is true.

Mr. Hicks: There will be no way of setting this one over for trial until Friday, so we can have a chance to find out, your Honor? [71]

The Court: Mr. Hicks, you already have one set for Friday.

Mr. Hicks: I know it.

The Court: And this case is set for trial and I think the thing to do is to try it tomorrow, that is what I think, and then everybody that is present in Donnybrook will probably have a sore head.

Court is now in adjournment until tomorrow morning at nine o'clock—oh, just a moment. You have one other proceeding that you want to take up. Can you try that out this evening?

Mr. Hicks: If we are going to try that out, I assume that it can be tried out this evening.

The Court: All right, court is now in adjournment until 7:30. Recess until 7:30.

(Whereupon, at 5:35 o'clock p. m., Wednesday, September 24, 1947, a recess was had until 7:30 p. m.)

EVENING SESSION — 7:30 P. M.

Mr. Fuller: If the Court please, before proceeding with this next case, I would like to make a statement in the Hayes case, especially in view of the criticism that was addressed to the members of the Fish and Wildlife Service, and the idea is that probably the criticism is partially the result of the

advice that I gave them, but I would like to make a statement.

The Court: Yes. [72]

Mr. Fuller: This contract was signed on October 9, 1946,—at least, that is the date here—and one of the sections in the contract is number 9:

“By this agreement or contract the venders hereby agree to divest themselves of all right, title or interest to said land including any claim, or compensation for damage or right they might have under and by virtue of what is known as the ‘Tucker Act.’ ”

That is in the contract dated October 9, 1946.

On January 13, 1947, in answer to a letter addressed to our Department dated December 27, 1946,—I am sorry I haven’t got the original inquiry or that letter—I made this answer:

This is addressed to Mr. Doren E. Woodward, Regional Supervisor, Division of Lands, Department of the Interior, Fish & Wildlife Service, 600 Weatherly Building, Portland 14, Oregon.

“Dear Mr. Woodward: In Re: U. S. vs. Bell Hayes, et al, Civil No. 3124, Tract 17, Malheur National Wildlife Refuge, Harney County, Oregon.

“Reference is made to your letter of December 27, 1946 wherein you call our attention to Section 9 of the agreement covering the purchase of Parcel 17, Malheur Lake. Section 9 reads as follows:

““By this agreement or contract the venders hereby [73] agree to divest themselves of all right, title or interest to said land, including any claim or compensation for damages or right they might have

under and by virtue of what is known as the 'Tucker Act'.

"Under the Oregon Law, Section 67-1601 O.C.L.A., an attorney has a lien for his compensation, whether especially agreed upon or implied, upon actions, suits and proceedings after the commencement thereof, and judgments, decrees, orders and awards entered therein in his client's favor and the proceeds thereof in whosoever hands they may be or come to the extent of the fees and compensation especially agreed upon with his client, if there be such an agreement, and if not for the reasonable value of his services, and such lien shall not be affected by any settlement between the parties to the action, suit or proceeding before or after judgment, decree, order or award.

"In the case of *Snow vs. Beard*, 82 Ore. 518, on page 530, the Supreme Court of Oregon says:

" 'The right of a client to compromise a suit or action without the knowledge or consent of his attorney, and even against his protest, is settled by our adjudications, *Jackson vs. Stearns*, 48 Ore. 25, *Jackson vs. Stearns*, 58 Ore. 57, notwithstanding the existence of such right which cannot be wrongfully exercised so as to deprive the attorney of his compensation.'

"In view of the above opinion of the Oregon Supreme [74] Court it would be my opinion that a client could also dismiss a proceeding without the consent of his attorney. In view of the section of the Oregon Law above set forth and the opinion above quoted, it would appear that as between the attor-

ney and client the attorney would have a claim for his compensation. However, the claim of the attorney would be against his client and not against the Government in the case under discussion.

“It is my opinion that Marcellus B. Hayes and Mary I. Hayes, his wife, and Adelbert M. Hayes would have a right to request the dismissal of the Tucker Act case heretofore filed. However, in the event that they fail to do so, or in the event they fail to request their attorneys to dismiss the case, that they would be estopped from claiming any rights under the Tucker Act by virtue of their signing the agreement wherein they divest themselves of all right, title or interest in and to the land involved, including any claim or compensation for damages or rights which they might have under and by virtue of the Tucker Act.

“Trusting that above answers your inquiry I am

“Your very truly, Henry L. Hess, United States Attorney, by Linus M. Fuller, Special Assistant to the United States Attorney.”

I am sorry I haven't the inquiry addressed to our department. That is an answer that I made to the Fish and Wildlife Service pursuant to the section 9 that is contained in that [75] agreement executed by the Hayeses on October 9, 1946.

I don't know what to say, but if there is any criticism I suppose that I am to be blamed. I admit that this letter was sent to them after the Hayes contract had been signed. It is possible that other contracts are signed pursuant to this letter, I don't know, but I want the Court to know the facts. I offer this in

evidence. This is a copy. I do not have the original.

The Court: Well, I don't think it is pertinent, Mr. Fuller. After all, the Court is not bound by your opinion and I am not bound by the opinion of the Supreme Court of the State of Oregon, ——

Mr. Fuller: I realize that, but ——

The Court: —— and your defense of what your clients do after they have done it is an entirely different thing from advising them before they do it, and if I found that you had advised them before they did it then I would have taken that matter up specially, but I take it that you were asked about a completed contract and what you thought they could do to justify it.

Mr. Fuller: In this case the contract was not completed.

The Court: That is true.

Mr. Fuller: But whether they relied upon contracts in other cases ——

The Court: I haven't any idea about that, and I don't care, [76] because I am dealing with a situation that I have before me, and I say that in this situation it was absolutely unethical for the Government of the United States or any of its agencies to try to compromise behind their attorneys without having people that had attorneys have them look over the contract before they signed it, and I say that deliberately and I want that included in any record that goes up in this case. I absolve you from any blame, because, after all, this was an executed contract.

Mr. Fuller: Well, in this case the contract was

signed October 9, 1946. The answer, which was unverified, was filed on October 2nd, 1946, seven days before. Now, it is true that an appearance was made in this case a week before, however, by an unverified answer. Of course, I presume they should have knowledge of Mr. Hicks and Mr. McCulloch representing them, if they filed the answer.

The Court: Now, there is no question about that, and there is no question but what everybody knew that they were representing them. I knew it, and everybody else knew it.

Mr. Fuller: That is true, but I just want to tell the Court the facts. I don't want you to think that I in any way went behind their backs, not intentionally at least. I just wanted you to know the facts.

The Court: I think I understand the facts, but, as I say, in regard to this, I understand you were not consulted before [77] this contract was entered into. Is that correct?

Mr. Fuller: As far as I can remember, that is the first that I had. Now, I am not swearing to that, because things happen, and I know there has been discussion referred to by Mr. Hicks and Mr. Boylan. That may have been referred to before or after, I can't say. Now, that was in answer to an inquiry addressed to our office, and that was after this contract was signed.

The Court: Now, I won't change my mind in the situation. I don't say that anything I have said there fits into what you have said, but if it does it will have to stand.

Mr. Fuller: I just want you to know.

Mr. Boylan: If the Court please, I might say, in that connection, that at the time I was on the witness stand I had no knowledge of this letter; I hadn't seen it or known that it was signed.

The Court: I think the situation is perfectly clear and all the facts have been developed and I have expressed myself fully and very forcibly on what I think about it. That is the size of it.

(Whereupon, at 7:40 o'clock p. m., Wednesday, September 24, 1947, the trial of the above-entitled cause was continued to 10:00 o'clock a. m., Thursday, September 25, 1947.) [78]

Thursday, September 25, 1947, at the hour of 10:30 o'clock a. m., the trial of the above-entitled cause was resumed, and in the presence and hearing of the court and jury, and continued as follows:

Mr. Hicks: Mr. McCulloch will make the opening statement, your Honor.

The Court: You may proceed.

Mr. McCulloch: * * * * * We claim that in this case these lands have another value, and we call that our duck-shooting value. These lands are being taken by the Government as a part of a bird reserve. Now, it has been frequently stated and publicly stated, and admitted by the Government even in the pleadings in this case, that as many as a million waterfowl feed upon Malheur Lake during the hunting season each year. Now, I haven't counted them, that's the Government's figures on it, and it may vary one or two each year, I don't know about that, but there is a large number of ducks and geese and other water-

fowl that have hatched out in the lakes of the North that each year move through to their winter feeding grounds in the South, and it is a well known fact, as stated by the Government experts, that this Malheur Lake is on a flyway of the immense flocks of geese and ducks that fly north and south, that every year about one percent, they state, of the entire waterfowl population of the United States passes over this flyway; that there's something more than a hundred [79] million ducks and geese in the United States, and more than a million of them pass through here and light on and feed on Malheur Lake.

Now, we own a part of that lake, as set up here. We state in our pleadings, and it is admitted by the Government in this case, so that there will be no evidence submitted you on that fact, that this is a flyway for ducks and geese, that many of them do come through here and light and feed upon the lake, and that it is an excellent hunting ground. We also state that it is a very valuable hunting ground.

Mr. Fuller: If the Court please, we are not admitting that at all.

Mr. McCulloch: I take it on that I was interrupted.

The Court: The Government say that they have not admitted the fact that this is a valuable hunting ground.

Mr. McCulloch: The pleadings admit it.

The Court: Well, the Government say that they do not.

Mr. McCulloch: Well, then I will stand cor-

rected on that and they may make their statement on it. That was my understanding of it.

The Court: It is not admitted by the Government. They will put on proof of that.

Mr. McCulloch: I don't want to make any statement that is not in the pleadings in this case. I can read the pleadings, if the Court wants me to. [80]

The Court: No. Go ahead.

Mr. McCulloch: All right. It is stated in the pleadings in this case and, I think, admitted by the Government's pleadings, that the Government for a number of years have been acquiring lands in and about Malheur Lake, Harney Lake and Blitzen Valley and other places adjoining here for a bird reserve, that people are excluded from hunting on that bird reserve, and for that reason our lands —

The Court: Just a moment. That is not proper, Mr. McCulloch.

Mr. McCulloch: Well, then I beg the Court's pardon, but I say it is in the pleadings and they admit it.

The Court: Even so, the Court is going to instruct the jury that you can't add any values to this land by the fact that there has been a bird refuge constructed here upon these lands.

Mr. McCulloch: I don't believe the Court understands the point I am trying to make, and I would like to just make that and then I will conclude and not bother about that any longer. I attempted to set up in the pleadings in this case that our lands are valuable for duck-shooting purposes, and I attempted to state in the pleadings why, and I at-

tempted to state the reason why they are valuable is because there are no other shooting grounds in that vicinity.

The Court: That is right, ladies and gentlemen, and that is because the Government has established this bird refuge, but the fact that the Government has established this bird refuge and excludes everybody else does not give this land any special value because this land is being taken and made part of the bird refuge and that is going to cut off all the hunting rights.

Mr. McCulloch: I don't know as it would be proper or not, but I would like to reserve an exception to the ruling of the Court in excluding me from making a statement in accordance with the pleadings.

The Court: All right, you may have your exception.

Mr. McCulloch: In addition to the value of the Malheur Lake lands and of the Hayes lands particularly, as I have heretofore discussed to you, these lands have a further value which ordinary lands do not have, and I want to point that out to you. Malheur Lake, in addition to the other extraordinary things that I have pointed out, is an extraordinary place for muskrat to grow and thrive. *****

Mr. Fuller: (Opening statement on behalf of the Plaintiff.)

Mr. Boylan: May it please the Court, at this time I am offering in evidence Government's Exhibit No. 2.

Mr. Hicks: To which we object, your Honor, upon the basis of the record as already made in respect to the exhibit.

The Court: The exhibit will be excluded.

Mr. Boylan: May I have an exception? [82]

The Court: You may have an exception.

Mr. Boylan: I would like to make an offer of proof, your Honor, on that.

The Court: Ladies and gentlemen, you may be excused while the Government makes an offer.

(The jury was thereupon excused from the presence and hearing of the court and counsel and in their absence proceedings were had as follows:)

Mr. Boylan: If the Court please, at this time the Government offers to prove by competent evidence that on October 9, 1946 an offer, which is designated by the Government's Exhibit No. 2, to sell 1101.68 acres of land was made by the defendants Marcellus B. Hayes, Mary I. Hayes and Adelbert M. Hayes, as the owners of this land; that this offer was in writing and subscribed by these parties, and it provided that they offered to sell this tract of land for the sum of \$16,000, with a "reservation of the right to use in livestock ranching operations, such as harvesting of hay and feeding and grazing of livestock, the surveyed land and Special Master Tract 48 in the bed of Malheur Lake for a period of five years" from the date of this instrument, October 9, 1946, "in accordance with rules and regulations of the Secretary of the Interior." That this offer to sell was based upon a valid consideration, expressed in

the offer; it particularly described the lands to be sold; it provided that the option as exemplified by this offer [83] should remain in effect for three months, in other words, be subject to acceptance by the Government within a period of three months.

We further offer to show by this instrument that prior to the expiration of the three months, to wit, upon December 16, 1946, this offer was accepted by the United States of America acting by and through J. A. Krug, Secretary of the Interior, by the Acting Director of the Fish and Wildlife Service—Mr. P. H. Johnson, Acting Director of the Fish and Wildlife Service.

This offer is in substance the plaintiff's pleading of estoppel to introduce any evidence or claim anything in excess of the consideration expressed in this agreement, that is, the sum of \$16,000, with the reservation.

We also in this exhibit have a copy, a signed copy, of a letter signed by P. H. Johnson, Acting Director of the Fish and Wildlife Service, dated December 16, 1946, in which he notifies Mr. M. B. Hayes, one of the defendants, Box 368, Burns, Oregon, that the offer contained in this option is accepted on that date by the United States and enclosing a copy of the purchase agreement as accepted.

Also a copy of a letter by Mr. O. H. Johnson, it is, instead of P. H.,—O. H. Johnson, Acting Director, to Mr. Adelbert M. Hayes, at the same address in Burns.

We are objecting to any testimony in excess of the [84] sum of \$16,000 as set out in this contract,

and we are asking that those objections to such testimony be carried to all such testimony without the necessity of making an objection at each time.

Mr. Hicks: May I note an objection to the offer, your Honor?

The Court: Yes.

Mr. Hicks: We interpose an objection to the acceptance of the offer of proof on the ground, first, that such testimony at this stage of the proceeding is incompetent, irrelevant and immaterial, and point out in that connection that at the request of Mr. Boylan, of Government counsel, the Court entertained all factual and legal questions applicable to the validity of the contract, that question is already now adjudicated, and I think the material contained in the offer of proof is already now contained in the record.

The Court: Do you desire any further consideration of the question, or do you desire that the record that has been previously taken up be incorporated as part of your offer of proof and the Court deal with it on that basis?

Mr. Boylan: Yes, I would ask that the testimony heretofore taken be included as part of the offer of proof.

The Court: On that basis, the Court will adhere to the previous ruling and exclude the document in all respects, that is, it won't be used in this case at all, because of the fact [85] that if you use it it would bear implications and the testimony which was taken by the Court would have to be repeated before the jury; therefore, the Court feels that it

is not a proper matter to be brought forth, since the Court has considered the question and believes that the contract was not properly obtained.

Likewise, I am a little at fault technically about the situation in this case. As I understand it, an offer in a declaration of taking should conform to the original complaint, and, as I understand it, this Declaration of Taking did not conform to the original complaint; it started to take the fee simple title, and, as I understand it, by Declaration of Taking which was filed February 11, 1947. The Second Amended Complaint was filed February 13, 1947. I don't know exactly what limitation that puts upon the matter, but I am inclined to think that this is not in conformity with the statute.

Mr. Boylan: May I have an exception to the ruling of the Court on the offer of proof?

The Court: Yes. The debate I have in my mind now is the question of what I should submit to the jury, whether I submit this tract as a whole without any reservation or submit the tract with the reservation.

Mr. Boylan: Well, if the Court please, the original complaint apparently just called for the taking of the fee simple title. That, however, was under the general law and not by [86] virtue of the Declaration of Taking Act, as I understand it. Then later a Declaration of Taking was filed in which the Government actually took a somewhat lesser estate, that is, the fee simple title with this reservation added to it. Now, if there had been an actual taking under the first complaint I agree with your Honor, but

there was no actual taking under the first complaint, because there was no ——

The Court: As I understand the technicalities, the Declaration of Taking Act specifies that the declaration shall be filed for the estate which was outlined in the complaint.

Mr. Boylan: Well, I am not prepared to state on that, your Honor, at this time.

Mr. Hicks: It occurs to me, your Honor, that we may be able to eliminate some questions there by stipulation with counsel. I don't know. I realize that we can't stipulate jurisdiction in respect to pleading the statute, but I think we can work out something that should eliminate one feature of it.

The Court: Well, all right. You may talk, if you want to. Court will be in recess.

(A short recess was had, after which the trial of the cause was resumed, in the presence and hearing of the Court and jury, as follows:)

ADELBERT M. HAYES

one of the defendants herein, was thereupon produced as a witness in behalf of the defendants Hayes and, having first been duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Hicks:

Q. Mr. Hayes, where do you reside?

A. Lawen, Burns.

Q. And where were you born?

A. Born at Lawen.

(Testimony of Adelbert M. Hayes.)

Q. And that is in Harney County, Oregon, is it?

A. Harney County, Oregon, yes.

Q. And where is that with reference to the tract of land described in the complaint here?

A. About six or seven miles due north of that tract of land.

Q. And where have you lived all of your life?

A. In the Harney Valley, right on that ranch and on this property.

Q. When did you first become familiar with the tract of land that we are concerned with?

A. About 1907.

Q. And how old were you at this time?

A. Well, I was about—I was born in '96. I was about eleven years old. [88]

Q. Yes. You have been down there ever since, is that right?

A. Been down there ever since, that is right.

Q. What is your occupation?

A. Farmer, stock raiser.

Q. And what is the main feature of your work? That is, farming, or cattle raising, or what is it?

A. Well, of course, they work together. I do lots of farming.

Q. And state whether or not you have operated this particular tract of land during the years in conjunction with your folks, with your father and your mother? A. I have.

Q. And you work with them and operate the place with them, do you?

A. That is right.

(Testimony of Adelbert M. Hayes.)

Q. Now, what kind of a plant have you there, Mr. Hayes, in conducting your cattle and farming operations?

A. Well, we have a plant that has been built up over a period of years. We have our summer range and our winter quarters. This particular tract of land is our winter quarters, the heart of our plant.

Q. You say you have a summer range. Do you have any rights under the so-called Taylor Grazing Act? A. We do.

Q. And that is connected with this tract of land, the deeded land, is it? [89]

A. Yes, sir.

Q. What is the procedure there as to the summer range and the winter range?

A. Well, in the spring of the year we turn the cattle onto our summer range, and then along after the range dries up we have other properties that we put them on first, but generally along in September we put them on the lake, on this property that we are talking about.

Q. Are you referring to the cattle that are operated by your mother and your father and yourself? A. That is right.

Q. And how many cattle have you been running the last number of years, Mr. Hayes?

A. We try to run right around five hundred cattle all the time.

Q. And where do you graze those cattle in the summertime? A. North of Burns.

(Testimony of Adelbert M. Hayes.)

Q. Including the Taylor Grazing land?

A. Yes, including the Taylor Grazing land.

Q. And when do you bring the cattle into this tract of land for grazing, what time of year?

A. We generally put them in there in September.

Q. And how long do they remain there on this tract for winter feeding?

A. Well, we generally leave them there from September right until the middle of February, until up in March. [90]

Q. Now, do those cattle just graze during that period you mention just on this particular tract of land? Do they just graze on this particular tract of land?

A. Yes, on this particular tract. We have a little lake land at the present time leased from the United States down there.

Q. Where is that with relation to this?

A. Due north.

Q. What I am getting at, Mr. Hayes, you say right at the moment you have a little extra land leased? A. Yes.

Q. Did you graze your cattle last winter partly on that land? A. Partly on that land.

Q. How much acreage is involved in that piece?

A. I don't know exactly. It is less than one hundred and sixty acres.

Q. Yes.

A. I would say probably one hundred and twenty or one hundred and thirty acres.

(Testimony of Adelbert M. Hayes.)

Q. Now, before you leased that part from the Government where did you graze these cattle for winter grazing? A. On our own land.

Q. And do you refer to the tract that we are concerned with here? This tract that is on the map?

A. That tract that is on the map, yes.

Q. The tract that is involved in this proceeding? [91] A. That is right.

Q. Now, how are these cattle fed? Do you cut hay down on the tract? A. We do.

Mr. Fuller: If the Court please, I think he is leading the witness. He can ask him how they are fed, not if he cuts hay.

The Court: That is right.

Q. (By Mr. Hicks): Well, tell us, then, Mr. Hayes, about the crops that are raised on this tract, if any.

A. Well, it is natural—we have a good many acres of natural meadow, natural grasses, and the past few years we have raised some wonderful grain crops in there.

Q. Now, would you be good enough to step down to the map and for the jury's information, point out the meadow land that you refer to and what the production is—Could we put the map up, your Honor, so the jury can see it? I don't know that they can?

The Court: Can you see the map from there?

A Juror: Not too good from here.

(The map was then moved.)

(Testimony of Adelbert M. Hayes.)

Q. (By Mr. Hicks): Mr. Hayes, you are familiar with the map which is Government's Exhibit 1, I believe? A. I am.

Q. Now, would you, with the pointer, or with this pen, point out to the jury the areas that are the meadow land and state [92] what has been produced on there from year to year, to your knowledge. Now, stand over there, if you want to, any way so they can see.

A. This is the road coming up the north part of the field right here. This is a portion of sagebrush land around this corner here. This is all natural meadow in here. This is a knoll here. This is natural meadow all along this side of that knoll. This portion of the land is in grain at the present time, and also this portion in here.

Q. Now, you are referring to the surveyed or deeded lands?

A. That is right, the deeded lands.

Q. And the lands above the meander line?

A. The lands above. This is the meander line here. All this portion along below the meander line adjacent to this part of the deeded land, that is all meadow; that is all cut and bunched at the present time. This portion of the lakebed lands, this is all cut and bunched hay at the present time. This portion of land along here, that's tules. I have raised wonderful crops of grain upon this land in years past. I have also raised grain on all this portion of the lakebed along in here and out through here. And there's tules, a few tules,

(Testimony of Adelbert M. Hayes.)

around in this portion of the lake right here. This corner here and all out in here is all cut and bunched hay at the present time.

Q. I want to ask you, Mr. Hayes,—I think you may resume the [93] stand now—approximately how many acres of meadow land are above the meander line on which you have produced the hay, as you have testified, from year to year?

A. Oh, I would say in the neighborhood of one hundred acres.

Q. And what kind of crops have you been getting down there?

A. Of course, climatic conditions had quite a bit to do with that, but ordinarily they are fine crops.

Q. Was there a period of dry years beginning back there somewhere? A. There was.

Q. Could you tell us, just roughly, what those years were?

A. Well, we had a series of years starting along about '28 when the lake commenced to dry up. Of course, our uplands didn't get any moisture; they weren't very productive. We followed that water down. Your grass grows as you follow the water out, and I have also planted grains on this water—ground that the water receded off of. In '29, I think, was the first year that I put any grain in down there. At the present time I don't suppose—it wasn't many acres; probably thirty-five or forty acres. In '30 I put in more acreage. In '31 I had in a large acreage of grain. That was a very dry

(Testimony of Adelbert M. Hayes.)

year. The lake completely dried up that year. In '32 I didn't have any grain. In '33 I had in probably two hundred acres of grain. '34 was another dry year when the complete lakebed was in grain. I had it in grain in '35, and the last [94] crop of grain up until this year that I raised upon the lake was in '36.

Q. Now, this grain that you grew during those dry years, where was that located with reference to the center line of the lake and the areas north of it?

A. Well, we had planted grain as far out as the center of the lake.

Q. Well, will you tell us with reference to the locations on the map the areas in which you have grown grain?

A. Well, it has been grown almost continuously from the meander line to the center of the lake, as far as our holdings go there.

Q. Now, state whether you have grown grain above the meander line?

A. Not too much. I have more grain above the meander line this year than I have ever had.

Q. Do you have a crop of grain growing down there now? A. I have.

Q. And is that on the lake land or on the deeded land? A. That is on the deeded land.

Q. Yes. About how many acres do you have there now?

A. I have around thirty-five or forty acres on our place.

(Testimony of Adelbert M. Hayes.)

Q. And what kind of a crop of grain is that? That is oats, isn't it?

A. That is oats, a little barley. [95]

Q. And what kind of a crop is it? What kind of a crop is it? I mean is it——

A. It is a fair crop.

Q. Yes.

A. Around sixty bushels to the acre, I imagine.

Q. Now, state whether or not in growing grain over these years that you testified to you have grown it in various locations throughout the tract, or has it been limited to certain specific areas?

A. That is right, different places on the—due to the conditions of the soil and washing conditions, why, naturally you pick the best spot to put your grain in.

Q. Have you ever made any effort at controlling the water down there up to this time, Mr. Hayes?

A. No.

Q. Now, referring back to the years that you testified to that you grew grain down there, I want you to tell the jury, in your own way, the kind of crops you got and the productivity of those grain crops that you mention. What were the crops?

A. Oh, we had a wonderful yield. It is very productive, and we had a wonderful yield, sixty, seventy, as high as a hundred bushels of oats to the acre.

Q. Would that oats be threshed or would——

A. That oats, the greater portion of it, was threshed. However, [96] I have stacked lots of

(Testimony of Adelbert M. Hayes.)

oat hay and rye hay down there to feed our cattle in the winter time.

Q. Now, to what extent have you been on this land from year to year from the time you were a boy?

A. Always been there during the haying season, and of course during the winter months I wasn't there so much, but we always had a man there. We have always had somebody there every winter, except perhaps maybe a few winters. I wouldn't know but what there is somebody down there every winter.

Q. Have you ever lived down there yourself?

A. I have. During those years I was farming so successfully down there I lived there all the time.

Q. Are you familiar with this entire tract?

A. I am.

Q. What do you say about the soil qualifications of the tract?

A. Wonderful. It is wonderful soil. The abundance of your crop proves that more than anything else. You will raise some wonderful crops there.

Q. Now, state how the soil varies from one part of the tract to the other, if you know. Does it have a common quality, or is there a difference?

A. Well, of course, there is some greasewood land there, some high land, there's salt grass and stuff that grows on it, that is not suitable for grain purposes, but all your low land there is suitable for agriculture, for grain purposes. [97]

(Testimony of Adelbert M. Hayes.)

Q. Now, aside from the question of water control, Mr. Hayes,—can you hear me?—Aside from the question of water control, what if any acreage in this tract of the lakebed land, to your knowledge, is not available for grain production?

A. The lakebed land is not available for grain production?

Q. Well, what parts of it, assuming the water control, what parts of it do not have capacity for producing grain?

A. The lakebed land, there isn't any portion of it that is not suitable for grain growing.

Q. On how many places throughout the lakebed land have you actually grown grain during the years you have testified?

A. Practically all of it at different times. Maybe not all the same years, but at different times.

Q. By that you mean at different places throughout the area? A. Yes.

Q. Mr. Hayes, referring to this extreme northerly part, the part down near what you call the center of the lake, has grain been produced on that land as well?

A. That is very good soil, very good land.

Q. And have you produced grain on that at various times, or under what—

A. At times I have.

Q. How? A. At times I have, yes.

Q. Now, that is the lower area, isn't it? [98]

A. That is the lower, out in the lakebed.

Q. Now, you have mentioned some hay produc-

(Testimony of Adelbert M. Hayes.)

tion on the meadow land. Will you tell us the quality of hay you get on that land, Mr. Hayes?

A. Well, we get what we call sugar grass and a wire grass, blue-joint. There's several different kinds of grasses that grow. It is a very good quality of hay for lake hay, a very good hay.

Q. In former years did you stack the hay?

A. Yes, we used to stack all the hay.

Q. And when did you discontinue the stacking of the hay?

A. Well, the last few years we haven't stacked the hay. We have been cutting it and bunching it, rake-bunch it.

Q. And is there any particular reason why you rake-bunch it instead of stacking it?

A. Well, because, for one thing, you get away from your cost of stacking it, also feeding it out, and cattle do just as well on it.

Q. Well, now, after the hay is cut, I want to ask you what if any pasture develops there? Will you describe that condition for us?

A. Yes, after your hay is cut you—those meadows grow up with green grass and it is a wonderful pasture along with your bunched hay.

Q. Well, can you describe the quality of that pasture a little [99] further, Mr. Hayes?

A. Well, naturally it is a finer texture pasture, it isn't coarse like if it had continued to grow in its former state, and it is green. The cattle thrive on it and do fine.

Q. Now, state whether or not in the normal year

(Testimony of Adelbert M. Hayes.)

the waters of the lake in the springtime come up and irrigate the land, the lakebed land?

A. Oh, the water?

Q. Yes.

A. It practically covers all the lowlands there, when years are normal, every spring, then as the summer comes on this water recedes, goes back, and then for years and years you could almost depend on what you are going to do down there each year. Of course, since they put the dike in the lake we don't get the—it doesn't dry up and go back like it used to.

Q. Well, as the lake recedes in the spring—as it recedes in the spring, what develops there, if anything, in the way of forage and the grasses?

A. Well, your grasses, naturally, those grasses, most of them, will grow in water. As the water recedes, why, it continues to grow.

Q. Are you familiar with the elevation of this tract, Mr. Hayes?

A. No, just where the water is, as far as figures are concerned, I am not.

Q. I want to ask you whether or not, after the water has receded [100] downwards on the tract, there is, to your knowledge, any sub-irrigation?

A. Oh, surely, the ground is wet, and as long as water is in that vicinity it naturally continues to sub out there and keep your soil moist.

Q. In the normal year, from your knowledge of this particular tract of land and these acres that produce the hay, what would be the production,

(Testimony of Adelbert M. Hayes.)

the average production, from year to year, of the hay of the quality you described?

A. Oh, a ton to a ton and a half to two tons to the acre.

Q. Now, getting back to the grain for a minute, I want to ask you, Mr. Hayes, how you farm the grain? By that I mean do you plow it?

A. I have plowed very little; generally disk and drill.

Q. And does that comprise the whole operation?

A. That comprises the whole operation.

Q. What do you say about the weather conditions on this tract, I mean the weather in that area, including this tract, as compared with other areas of Harney County, including Burns, in the immediately joining vicinity?

A. Well, in comparison to Burns it is a much milder place to winter cattle. You put your cattle down there, your calves are born in the wintertime, there is very seldom you ever lose calves down there. You have your protection of those tules. It is almost like raising cattle in the barn. [101]

Q. Does that have any particular advantage in the cattle-raising business, Mr. Hayes?

A. It certainly is.

Q. Now, what is the fact, from your knowledge of that lake back during the period of years, whether cattle have been able to graze there all winter without any hay?

A. That happens many winters.

(Testimony of Adelbert M. Hayes.)

Q. And have you yourself observed it many winters?

A. Our cattle have wintered there many winters without hay, a portion of them. I wouldn't say all of them have.

Q. Does the climatic condition have any bearing upon that situation?

A. Oh, to a certain extent. The condition of your cattle has more to do with that than anything else. You naturally leave your stouter cattle there.

Q. And state whether or not in your operation with your folks there have been times that you have fed hay during the years?

A. Oh, yes, we have fed hay for years down there.

Q. And when would you begin to feed your hay?

A. Oh, ordinarily, in the ordinary winter, we commence feeding hay down there along from the first of January to the middle of January.

Q. Now, can you tell the jury what time it is that the people up around Burns here begin feeding their cattle hay?

A. You see people feeding cattle up here from November on. [102]

Q. To a stock man is that any particular advantage?

A. It certainly is. It cuts down his operating costs a lot.

Q. It does what?

A. It cuts down his operating costs a lot, the condition of the cattle.

(Testimony of Adelbert M. Hayes.)

Q. Ever see any ducks and geese down on the lake, Mr. Hayes? A. Thousands of them.

Q. State whether or not that is a favorite ground for ducks and geese and waterfowl?

A. It is.

Mr. Boylan: Objected to as immaterial.

The Court: He may answer.

A. It seems it is a natural home for them.

Q. (By Mr. Hicks): Now, any muskrats down there on your property, Mr. Hayes?

A. There is.

Q. Tell the jury, in your own way, about the muskrat production as you have observed it on this particular property here?

A. Of course, muskrat production is a good deal like anything else, you have years that there are more muskrats than other years,—I suppose it is disease or something—but, from time to time, always it has generally been—well, generally there have been somebody camped there that trapped in the wintertime; they have trapped and looked after the cattle. Usually they trap and feed, feed in the forenoon and trap in the afternoon. [103] It was a natural thing to do.

Q. Can you tell us about some of the years' production of muskrats on this particular tract, Mr. Hayes?

A. Oh, it was over a period of years. I couldn't tell you as to the number of years.

Q. To look back on them, as to dry years when there weren't any muskrats?

(Testimony of Adelbert M. Hayes.)

A. I think that land was trapped 'most every year; in fact, every year.

Q. Now, have you been operating this property in active cooperation with your parents for all of these years? A. I have.

Q. And are operating it now?

A. That is right.

Q. Have you had any other winter quarters for grazing of cattle?

A. No, sir. We have other property around Lawen, but we winter cattle, put them through the winter, down there and then along when the break-up is we move them back to Lawen and finish down.

Mr. Hicks: You may take the witness.

Cross-Examination

By Mr. Fuller:

Q. Mr. Hayes, when you have muskrats down there you don't have much else in the way of grazing lands or grazing crops, [104] do you?

A. Yes, you do, because that portion of the lake that is lower, that lies out in what would be open water or tules. That is where the muskrats are. That doesn't affect your higher lands so much.

Q. I am talking about when you have muskrats you don't have grain growing, do you?

A. No, that is right

Q. And when you have grain you don't have muskrats, do you?

A. No, that is right, in the same land at the same time.

(Testimony of Adelbert M. Hayes.)

Q. You can't have both on the same land?

A. At the same time, no.

Q. Now, you have mentioned here that you run about five hundred head of cattle, is that right?

A. That is right.

Q. And you winter them on this land from September until the middle of February or March?

A. Somewheres around there, depending on the year.

Q. Now, in addition to this land that you own down there, what other land do you run these cattle on during the winter?

A. I have land three miles due west of the store at Lawen, on Silvies River.

Q. Do you run some of those five hundred head of cattle on that land?

A. No, sir, the cattle are summered north of Burns. [105]

Q. I am talking about the winter.

A. Oh, I misunderstood you.

Q. In the wintertime do you have any other land than this land under consideration here that you run that five hundred head of cattle on?

A. We have land there by Lawen.

Q. I don't know that you understand me. I am talking about land in the vicinity of the land under condemnation here. Do you run your cattle on that land and on any other land in the wintertime?

A. No, not consistently, no.

Q. You are leasing from the Government, aren't you, a tract of land?

(Testimony of Adelbert M. Hayes.)

A. Yes, a hundred—I don't know, this is the first year we have had it leased; it fit right into our setup there, it was easier to lease it than it was not to.

Q. And your cattle will run on that land?

A. They will.

Q. Now, this five hundred head of cattle, or whatever number you are running there, are they confined within fences on this particular tract of land?

A. They were for a period of years, yes. The last, up until—well, I would say the fence has been in poor repair up until, last winter, we repaired the fences between the Government land and our land.

Q. And when the fences were in poor repair the cattle grazed all over the lakebed, didn't they?

A. Well, not all over the lakebed.

Q. All in that area down there?

A. In that particular area down there, but that hasn't only been for over just a small period of years. It hasn't been for any length of time.

Q. For how long a period of time?

A. Well, I would say for the last—probably, maybe the fence has been down for three or four years, up until last winter.

Q. So for several years before last winter the cattle have grazed all over the land in that vicinity?

A. That particular area, yes. They didn't graze too far.

Q. Go off this land?

A. Yes, but the river channel there made quite

(Testimony of Adelbert M. Hayes.)

a line. They didn't go east of that—and they didn't go west of it at all.

Q. Isn't it a fact that the dust and the sand—the wind would blow that up along the fence posts for years and they would walk right over the fence?

A. That has been repaired, though, but during the time when that condition existed in that particular area there wasn't much grazing and we built the fences up on top of those levees all during that time up until the time that the Government acquired this land from our neighbors.

Q. Well, there was a period of time that there wasn't any [107] grazing down there on the lakebed; it was just too dusty, wasn't it?

A. No, sir, we never have had that condition.

Q. What blew up and covered the fences?

A. That was up on the higher land. There was tumbleweed would drift up against the fences and then the dirt would drift over it; but down in the lakebed——

Q. That dirt that blew up there, that was some of this fertile soil, wasn't it, that was blown?

A. That is right.

Q. Blew up on these fences?

A. That is right.

Q. Now, you said for the past few years you have been growing grain crops. For how many years past have you been growing grain, including this year?

A. Well, I would say—of course, you have to count on——

(Testimony of Adelbert M. Hayes.)

Q. Did you grow any grain there last year on this land?

A. We did not. I think up until this year the last crop of grain I raised on the lake was either '36 or '37.

Q. Then when you said that for the past few years you have been growing grain crops that isn't so?

A. I didn't remember saying that.

Q. I understood you to say that for the past few years you had grown grain crops on this land.

A. I am trying to confine myself to the truth, as far as I [108] remember.

Q. Then this is the first year since 1936 or '37 you have raised grain on this tract?

A. That is right.

Q. How many acres do you have in grain this year?

A. On this particular tract, I would say about thirty-five acres.

Q. Can you show on the map where that grain is growing?

A. It is in what we call the west forty, starting at the point about here; I would say it comes around and goes back into about here, in that particular area in there; then, over here, I would say that portion of the land in there (indicating).

Q. What is the condition of that grain crop at the present time?

A. What did you say?

Q. What is the condition of that grain crop at the present time?

A. Very good.

Q. Very good. Oh, I meant to ask you—while

(Testimony of Adelbert M. Hayes.)

you were at the map you pointed out a knoll here. I believe that that was the one that you referred to (indicating). A. That is right.

Q. What is growing on that knoll?

A. Greasewood, salt grass.

Q. Is that about eighty acres? [109]

A. I would say around seventy or eighty acres.

Q. Seventy or eighty acres. So on this upland now you have about seventy or eighty acres of greasewood and, you say, about thirty-five to forty acres of grain, is that right?

A. That is right.

Q. What else is growing on that?

A. Natural meadow. The rest of it is in natural meadow.

Q. That is along the meander fence, is it not?

A. And some in that north field, there is some natural meadow.

Q. Now, below the meander line you have some hay cut there at the present time, haven't you?

A. I have.

Q. There's a great deal of tules mixed in with that hay, isn't there?

A. Well, not in the greater portion of it. There's places where tules have been cut with the hay. That is the way we weed out the tules down in there. When you see sign of other grass you cut it and the tules are cut.

Q. Along the east border of the property there is quite a bit of tules?

A. There is, but if you examine that closely you

(Testimony of Adelbert M. Hayes.)

will see that there is good grass growing all through those tules. Of course, the tules predominate now, it looks to you.

Q. At the present time are you able to go beyond where your hay is cut to the center of the lake? [110] A. No.

Q. Why not?

A. This country has all been under water. The water has just receded off of this during the last month or so and it is bare.

Q. How long has it been since it receded off of this land up here?

A. Well, I couldn't tell you exactly. There was water in this portion of the lake right here—no, right in here it is—this spring. When I went back down there to hay that was all dried up. Some time between when I was planting grain and I went back to hay the water has dried up down in there.

Q. Right in here, there are tules down in there (indicating)?

A. No; right in here there's some tules, in there (indicating).

Q. Principally that?

A. No, not principally that. You can grow grain on that if you want to.

Q. Did you grow grain on there this year?

A. No, but it surely can be grown on there.

Q. You haven't grown any since '36 or '37, have you? A. No, sir.

(Testimony of Adelbert M. Hayes.)

Q. Isn't it a fact that the water has been there ever since? A. That is right.

Q. So you couldn't grow grain there the last ten years or eleven years, could you?

A. That is right. [111]

Q. Is there any water control on that property at the present time, on this particular tract?

A. No, sir.

Q. Now, if I remember aright, you said that cattle have grazed there all winter without hay.

A. They have, yes.

Q. Were they in pretty good condition when they went on the land?

A. Oh, yes, the cattle are always in good condition here in the fall of the year, or should be.

Q. What condition were they in at the end of the winter?

A. They came out of there in good condition.

Q. In as good condition as when they went in?

A. Well, maybe not quite as good, but they all came out of there in good condition.

Q. They lost quite a bit of weight, didn't they?

A. They lost some weight. Cattle always do in the winter.

Q. Even when they are fed hay?

A. Even when they are fed hay, yes, I think cattle will lose a little weight, more or less.

Q. They lose more weight when they have to wander over a large area to get food, wouldn't they?

A. I wouldn't say so if they have plenty of feed, no.

(Testimony of Adelbert M. Hayes.)

Q. No, I say, but when the feed is scarce and they have to wander around? [112]

A. When we left our cattle there the feed wasn't scarce.

Q. But still they did lose weight then?

A. Well, that is natural. That is a condition that you will find any place, I think.

Mr. Fuller: I believe that is all.

Redirect Examination

By Mr. Hicks:

Q. Mr. Hayes, you mentioned something about a dike. Would you tell us, if you know, when that dike was constructed?

A. What is that, please?

Q. You mentioned something about a dike. Would you tell us, if you know, when that dike was constructed?

A. I imagine around '35 or '36.

Mr. Boylan: If the Court please, I don't remember any such testimony and I object to it as improper redirect, not pertaining to any of the issues in this case.

The Court: Objection sustained.

Q. (By Mr. Hicks): Now, Mr. Hayes, I am a little bit confused here, perhaps, but in my direct examination I asked you about this tract carrying so many cattle through the wintertime; then counsel developed something about some fences through there that for a period were down. Will you give us the history of this tract in regard to fences that were maintained on it?

(Testimony of Adelbert M. Hayes.)

A. The Government has never made any effort to maintain their part of the fence down there. [113]

Q. Back before the Government came into this matter, the Bird people, did you maintain fences? Was this tract fenced?

A. Yes, the fences were always kept up in good condition.

Q. And you mentioned, I believe, a three or four-year period when the fences were allowed to deteriorate. A. That is right.

Q. And state whether or not that was during the period when the land was out of your possession.

Mr. Boylan: If the Court please, I object to that as assuming something that has not been shown or proven here. He has testified——

The Court: Objection overruled.

A. Well, during that period and since that time.

Q. (By Mr. Hicks): Mr. Hayes, you have been on that land since you were a little boy?

A. That is right.

Q. I want to ask you if, with the exception that you mention, the land has been kept fenced?

A. It has always been kept fenced except during this period.

Q. And when you talk about running four or five hundred head of cattle on this tract in the years before you leased from the Government, I want to ask you whether those cattle were wintered on this tract? A. They were, on this tract. [114]

Q. And that was year in and year out?

(Testimony of Adelbert M. Hayes.)

A. Year after year.

Q. Now, during the years when you didn't grow grain on these areas that you haven't grown grain on, what if any crops did you get on those particular tracts? Those years when you were not growing grain on this particular tract, what if any crops did you get on that particular tract?

A. Your natural grasses, your meadow grasses,

Q. And of what service are they to you?

A. They are very necessary to winter your stock on. They are very good feed.

Q. Now, counsel asked you about the condition of the cattle when they are wintered there without hay, and I think that is fully covered. Now, I want to ask you how those cattle winter on this tract of land in the manner in which you are operating it now, with the windrows, and that sort of thing?

A. They come through it in good shape. The cattle wintered in fine shape.

Q. Now, how far down on this tract—I am referring down towards the center of the lake—how far down on that tract have you cut the hay, from year to year, and produced the crops that you have mentioned, the hay crops?

A. Natural meadow?

Q. Yes.

A. About like it is there now, about like the way it is cut [115] there now. Perhaps a quarter of a mile further south, at one time or another.

(Testimony of Adelbert M. Hayes.)

Q. And where would it be with reference to the center line as shown on the map?

A. Well, it would be quite a little ways from the center of the lake.

Q. Now, I understand that there is seventy or eighty acres of what counsel referred to as greasewood, is that right? A. That is right.

Q. Now, state whether or not that seventy or eighty acres produces any value to you as a stockman?

A. It does. There is quite a growth of grass on that. It also affords quite a bit of shelter for your cattle, too.

Q. And is the greasewood itself of any utility for cattle?

A. Yes, there is forage from greasewood, for that matter.

Q. And out of the whole eleven hundred acre tract, as I understand, there's some seventy or eighty acres of greasewood? A. That is right.

Mr. Hicks: That is all.

Recross-Examination

By Mr. Fuller:

Q. Is there any greasewood in the lakebed?

A. No greasewood in the lakebed.

Q. Now, this greasewood that we have referred to just now, do [116] you know if greasewood is an indicator of alkali?

A. I think you generally find that there is some alkali where there is greasewood, yes.

(Testimony of Adelbert M. Hayes.)

Q. So that this seventy or eighty acres up there you would consider as alkali soil, wouldn't you?

A. That is right.

Q. There is nothing else growing there? No sagebrush, is there?

A. No sagebrush.

Q. A little salt grass?

A. There's salt grasses, yes. Those grasses grow in alkali.

Q. Now, you say that the Government doesn't maintain those fences. Do you believe the Government should maintain the fences to keep your cattle in?

Mr. Hicks: We object to that as incompetent and irrelevant.

The Court: He may answer.

A. We fixed those fences to keep our cattle in and other cattle out.

Q. (By Mr. Fuller): Your statement was that the Government did not maintain the fences; for that reason your cattle——

A. They did not help to maintain them.

Q. Oh, they did not help to maintain them. How many years were these fences down?

A. Well, of course, when the Government first acquired those properties those fences were all in good shape. They stayed up for a period of years. I think that perhaps those fences [117] washed out of there about '43 or '44.

Q. They washed out practically every year that they had high water, didn't they?

(Testimony of Adelbert M. Hayes.)

A. Not those fences. Those fences were more or less permanent.

Q. What fences washed out when they had the high water?

A. A lot of meander line fences washed out in different places. Not in that particular vicinity they didn't.

Q. They didn't wash out there; but what particular fences on your property washed out during the high water?

A. Well, that fence would be the east line. I don't know if it washed out so much, but it was mashed over and never repaired. That that you were talking about awhile ago, that that was up on the levees that the wind blew over, in those dry years, the water didn't get up on that fence so much.

Mr. Fuller: I think that is all.

Further Redirect Examination

By Mr. Hicks:

Q. Mr. Hayes, did you ever know any of those fences in relation to this tract to wash out before 1935?

A. I think not.

Mr. Hicks: I think that is all.

Further Recross-Examination

By Mr. Fuller:

Q. It was pretty dry in 1929, '30, '31, '32—there wasn't [118] any water there, was there, to wash them out?

A. There was not.

Q. It was dry then, wasn't it?

(Testimony of Adelbert M. Hayes.)

A. That is right.

Mr. Fuller: That is all.

Further Redirect Examination

By Mr. Hicks:

Q. You can remember that land how far back?

A. As far back as I can—I say we have been there since 1907.

Q. From that time up until 1935, did you ever know one of those fences to wash out, up until 1935?

A. No, I can't recall.

Mr. Hicks: That is all.

Further Recross-Examination

By Mr. Fuller:

Q. Were there any fences up until 1935 out in the lakebed? Didn't the cattle just roam all over the old lakebed?

A. Well, of course, up until the lake went dry the lake shore was always our fence line; we didn't have any fences out there.

Q. No fences out there at all? A. No.

Mr. Fuller: That is all.

Mr. Hicks: No further questions. That is all.

(Witness excused.) [119]

The Court: Ladies and gentlemen, you are excused until 1:30.

(The jury was thereupon excused, and in the absence of the jury proceedings were had as follows:)

The Court: I am going to add to my ruling upon the objection a matter that I hadn't mentioned

before, objection to the contract or offer, whatever it may be called, that Mr. Hayes testified that he had been promised not only that he got the five years' occupancy but that he had an option to get the land from year to year in perpetuity, and that matter was not included in the presentation of the offer. Mr. Woodward testified that he redrafted that in accordance with his own ideas to make it conform to his instructions from the Secretary. I take it that that clause does not represent what the Hayeses thought it did when they signed the contract. That is an additional reason for making my ruling as I have in the past, and also it has some effect upon what I think about the Declaration of Taking.

Court is now in recess until 1:30.

(Whereupon, at 12:10 o'clock p.m., Thursday, September 25, 1947, a recess was had until 1:30 p.m., and thereafter, at 1:30 o'clock p.m., the jury was recalled and proceedings were had in the presence of the Court and jury as follows:) [120]

Afternoon Session

1:30 P.M.

Mr. Hicks: I will call Mr. Marcellus B. Hayes, your Honor. Mr. Hayes.

MARCELLUS B. HAYES

one of defendants herein, was thereupon recalled as a witness in behalf of the defendants Hayes and, having first been duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Hicks:

Your Honor, Mr. Hayes is hard of hearing. May I approach him?

The Court: Yes.

Q. (By Mr. Hicks): Mr. Hayes, you are the Marcellus B. Hayes who is mentioned in the complaint regarding this land? A. Yes, sir.

Q. What is your age, please?

A. I will soon be eighty-four years old.

Q. And what has been your occupation all your lifetime, Mr. Hayes?

A. Well, in my early life I worked at various things, but for the last number of years, half my life, I have been a stock raiser and a farmer.

Q. Running cattle? A. Yes, sir.

Q. And what else? [121]

A. Horse, sheep, hogs,—everything in the live-stock business.

Q. When did you move down to the Malheur Lake district?

(Testimony of Marcellus B. Hayes.)

A. Well, we bought that property in 1910, and I had it leased there two or three years before we bought it.

Q. When did you first move onto this land? That would be 1907?

A. No, we hadn't moved there. We had been there and cut the hay on it, but had an old cabin, but we built a house there along about the time we purchased the land.

Q. Now, Bell Hayes, who is one of the defendants here, is your wife, is that right?

A. Yes, sir.

Q. And did you and Mrs. Hayes move down onto the property?

A. Well, Mrs. Hayes never lived there, but we always had someone there up until, oh, along between '20 and '24 and '25, and then Del lived there for a number of years, made that his home.

Q. Now, since you went on there and first began cutting the hay and began operating the property in 1907, I understand you purchased it in 1910, is that right? A. Yes, sir.

Q. From that time on up to the present time have you used that land? A. Every year.

Q. And what did you use it for, Mr. Hayes?

A. For stock purposes, wintering stock, and grazing purposes, hay and grain. [122]

Q. Well, now, you know what we refer to as the deeded land? A. Yes, sir.

Q. The stuff above the line? A. Yes, sir.

(Testimony of Marcellus B. Hayes.)

Q. Tell the jury, in your own way, what you have been using that land for?

A. Well, the one hundred and seventy-odd acres there, years ago we cut hay,—there is a greasewood ridge that runs through this land from the house, runs kind of northeast—on both sides of that, and on up until the company, along about—I wouldn't say just how many years, but '34 or '35, they run this fence through there and they cut our meadow in two, but we had six or seven stack yards that we stacked hay in all the time,—not on that particular place, but around the field on the meander there was about three yards that was right on this deeded land that we stacked on.

Q. And the rest of the stack yards were where?

A. Well, on land that we acquired through possession and meander rights and——

Q. You mean the lakebed land?

A. Well, I guess you would call them that.

Q. Below the meander line?

A. It wasn't below the meander line. It was out where the water is.

Q. Are you referring to this land that we are concerned with here? I mean the tract that the Government has taken? [123]

A. Yes, sir.

Q. Now, tell us about the hay production, if there was any, below the meander line on the lake lands back through all these years, the forty years that you have known this land and occupied it.

A. Well, the different years there I believe it was cut up and stacked right around three hundred

(Testimony of Marcellus B. Hayes.)

tons of hay a year, sometimes a little more and sometimes a little less, and one of the largest stack yards we had, stacks, was on the meander out north and east of the house.

Q. What kind of hay production would you get per acre, Mr. Hayes?

Mr. Boylan: If the Court please, I think he should confine the production to recent years. I don't know that he is identifying these years that he is testifying about.

Mr. Hicks: I am assuming the general average, your Honor.

The Court: Well, specify the years.

Q. (By Mr. Hicks): Well, back as you know this land, what is its capacity to produce hay? I mean per ton per acre? I mean how much tonnage per acre?

A. Well, some of it will go a ton and a ton and a half, and lots of that sugar grass will go around two tons. Stacking to an average, I suppose there on that whole place there, the deeded land will average a ton and a half.

Q. And what was the fencing condition on this tract of land [124] through the years up to the present time?

A. Well, we have always kept a fence up there. The land has always been fenced. Even when we was operating the lake there, we had a fence that run on out through the level part out to the center of the lake, and since the water has come back there through the years that fence has washed out on us,

(Testimony of Marcellus B. Hayes.)

but the fence out on the higher land has always been kept up.

Q. Those years that you cut hay on the land did you cut all the hay that you could cut, or just what you needed?

A. Well, very often we cut and bunched and stacked all the hay that we thought we needed and rest of it we left in bunches, just as it is at the present time.

Q. Were there a series of dry years in there, Mr. Hayes? A. Yes, sir.

Q. Could you tell us, just roughly, what years that would be?

A. Well, it started along about '27 and '28, '29, '30 and '31 and '32 and '33 there, and after it got along about '34 and '35 the water commenced coming out in the lake.

Q. Now, during those dry years did that have an effect on your pasture up there?

A. Yes, sir.

Q. Tell the jury about it.

A. Well, when we had the dry years we farmed the lake, sowed oats and rye, and then as the water receded and went out to the center of the lake more, why, the grass came, lots of foxtail. [125] Take it along this time of the year, you go out there, it was just like a thick meadow.

Q. And that was true even during the dry years? A. Yes, sir.

Q. Tell us more about the grain production

(Testimony of Marcellus B. Hayes.)

down there, the kind of crops and what was realized.

A. Well, of course, our crops varied there. We started in not raising too big crops. The first crop we raised was right close to the house, east of the house, south and east, and then it drifted out and as the water dried up we followed it out, put in crops, until it went out to the center of the lake.

Q. What kind of production did you get?

A. Good. A-1.

Q. Could you tell us any more about it?

A. Well, the acreage, what it averaged, we had just as good grain there as is grown in any country. There's lots of oats there that go, oh, sixty or seventy bushels to the acre. Of course, some parts of it wouldn't average that much. As you follow the water out you got your best grain, where the water went off and irrigated it, but, as a whole, lots and lots of years there that grain would grow around seventy bushels to the acre average, oats, or better.

Q. Tell us about the irrigation of this land. How was it accomplished?

A. Well, in the wintertime the water would naturally flow out [126] onto this land, and then we was all ready to farm whenever the water started to recede; we followed it on back, we seeded right up to the water as the water went off this land.

Q. And when would the water reach its highest stage?

A. Well, that depended on different years, of

(Testimony of Marcellus B. Hayes.)

course, and different flows of the water, but along around the middle of June, something like that, would be about the highest.

Q. How many cattle have you been running down there, Mr. Hayes?

A. Well, we generally try to hold our cattle to about five hundred head, my son and I,—sometimes more and sometimes less, but we usually—we have about that number right now. And we winter them,—not all the winter. Last year we put them out and brought them back and took the calves and shoved them all off again. We got home from California the 4th of March, and the 9th of March we brought them back up to the old place and we fed them there nineteen days, and we got lots of rye grass pasture, and that's all the time we fed them last winter.

Q. What condition were those cattle in when you brought them in?

A. Oh, good condition. There was no cattle died from the effects of the winter. They all wintered in good shape.

Q. Now, Mr. Hayes, has that land in its history as you have known it wintered cattle without any hay?

A. There's land adjoining us on the west, people would run cattle there a lifetime that never saw a mouthful of hay in [127] their lives. There ain't a cow that has gone on that ranch that ever fed a mouthful of hay.

Mr. Fuller: If the Court please, I move the tes-

(Testimony of Marcellus B. Hayes.)

timony be stricken as to what was done on another tract of land here.

A. Just a fence between them and us.

The Court: The witness has testified. I will cover it by instructions. I will not grant a mistrial on this. Ladies and gentlemen, the testimony only relates to this land alone. That is all that is to be considered. This matter that has been injected here by Mr. Hayes has nothing to do with this situation,—another tract of land entirely.

Mr. Hicks: Just a fence between them, your Honor. I think he meant this tract, too. I meant to bring that up.

The Court: Well, that applies to you, Mr. Hicks. You are making an argument based upon what he has already said, which I have stricken from the record.

Mr. Hicks: May I ask some further questions in that regard to clarify his answer?

The Court: I should say not. Ladies and gentlemen, there is nothing unfair about this. You are simply trying the conditions as relating to this particular piece of land. When we get in on another piece of land that is an attempt to influence you by something that is not in this case.

Q. (By Mr. Hicks): Now, Mr. Hayes, I want you to limit all of your answers to this tract of land that is involved in this [128] case and no other.

A. All right.

Q. Will you do that?

A. All right.

Q. Now, state whether or not, in regard to this

(Testimony of Marcellus B. Hayes.)

tract of land, from your experience with it, it has wintered cattle without hay?

A. We have wintered plenty of cattle there that was wintered right in that pasture, in that field there. There will be a little explanation to that, too. We used to have partitions in the field and there was a drift fence through there. We watched these cattle, and if anything needed feed we put them in the north field and fed them hay, but the stout end of the cattle, they wintered on through there and they wouldn't get anything, but was turned out.

Q. Now, what about the weather conditions and the temperature conditions down there as compared with other areas immediately surrounding?

A. Well, you can go into that Lawen country, where our place is there, and the country is all bare; you come on up around Wright's Point and it is all snow; and you go out into our field there and there's lots of windbrakes, tules, greasewood,—these old cows drift in there of nights, and their little calves, and sleep there of nights, and then they come out in the daytime and go to work on this bunched hay.

Q. Now, just tell the jury generally how the cattle do there in this wintering condition?

A. Well, they winter fine. Of course, we have to feed other places. We look after them. If necessary to move them out of there—maybe in case that snow gets too deep, like hard winters we have in this part of the world, we take them away from there to other places; but the ordinary winter they winter there until such time as we want to pull them out of there.

(Testimony of Marcellus B. Hayes.)

Q. Now, during all these years that you and your son and Mrs. Hayes have been raising cattle, I want to ask you where it was that you wintered your cattle?

A. Well, we wintered them mostly on this lake property since we acquired it and got possession of it, since we got the property.

Q. You mean since 1907?

A. Well, along about that time; but at different times we have had more than five hundred head of cattle, sometimes we have had twice that number, and we have got other lands in the country that when we have got that over-stocked there, why, we move part of them out of there.

Q. Well, now, taking the dry years and the wet years together, Mr. Hayes, let me ask you whether or not there were any years when you did not have plenty of feed for those cattle? A. No, sir.

Q. I mean referring to this tract here? [130]

A. Well, if there wasn't hay on the upland, on the high land, the deeded land, the land we acquired there through possession, we had plenty of feed out in the lake. We sowed rye and oats. Some years we had dozens of big stacks of hay there right out in the lake.

Q. What kind of hay are you talking about now? A. Grain hay.

Q. Can you tell us how grain hay compares with other hay for feeding livestock?

A. Well, it depends on how it is put up and cured. If it is put up right and handled right it is the best hay there is.

(Testimony of Marcellus B. Hayes.)

Q. I want to make sure that you understood my other question. In the forty years you have been down there, I want to ask you if there was ever a year when you did not have plenty of feed for your livestock, either the grain hay or the other forms of hay and forage? A. No, sir.

Mr. Hicks: That is all.

Cross-Examination

By Mr. Fuller:

Q. Mr. Hayes, can you hear me from here?

A. Well, you have got to talk loud.

Q. Maybe I had better move up. If I understood you aright, you say you first moved on that land around 1907 under a lease?

A. We had it leased there for two or three years.

Q. Prior to 1910?

A. I think it was about 1910.

Q. Some time prior to 1910 you had it leased?

A. Yes, sir.

Q. From that time up until the lake began to dry in, I think you said, '28, '29?

A. '28, '29.

Q. Did you ever grow any grain from 1907 or '08 up until 1928 on the lakebed?

A. Well, the lakebed was pretty well under water along different years.

Q. You didn't grow any grain up until —

A. It started drying up there about '28. There was all hay out around them greasewood knowls, along the edge of the meander, and then as soon as

(Testimony of Marcellus B. Hayes.)

the cold weather set in they would drift out onto the higher land there.

Q. My question is, prior to 1927, all the time you lived there, you never grew any grain out on the lakebed, did you?

A. Come up a little closer.

Q. I say, prior to 1927, from the time you first moved on the land, you never grew any grain on the lakebed?

A. No sir.

Q. And then how many years did you grow grain there after 1927 or '28, whatever the year was?

A. Oh, I would say — [132]

Q. Let me ask you this: When did you first grow grain there?

A. Six or seven years.

Q. Six or seven years ago you grew grain on the lakebed?

A. Something like that. I couldn't give you about the date, about the time.

Q. Then the water started coming back about '34 or '35?

A. What?

Q. The water started coming back in about —

A. It did, but it never got over all the land there. There was land all over the margin of that lake for half a mile, some places more than that, the water got out there just far enough to create a good growth of grass.

Q. I am talking about the grain that you grew. I understood for about six years you grew grain on the lakebed, is that right?

(Testimony of Marcellus B. Hayes.)

A. Well, something like that. I don't know, it could have been a year short or a year over that.

Q. Six or seven or eight, then? A. Yes.

Q. Since that time you haven't grown any grain on the lakebed, have you?

A. Not this year. We have got grain growing on the higher land.

Q. On the upland? A. Yes sir.

Q. On the deeded land? A. Yes sir. [133]

Q. So it would appear that this is an unusual period of time, this dry period, that has not existed during your lifetime except that one period, is that right? A. I didn't get you.

Q. This time you were growing grain out there, this six or seven or eight years, that is the only time during your lifetime that grain was grown out there on that particular tract of land?

A. On this particular tract of land, of course, I have saw it out there dry in years before. I saw it out there in '88 and '84.

Q. You didn't own property out there at that time? A. No, not at that time.

Q. So from 1907 to 1947 you grew grain six or seven or eight years out there? A. Yes, sir.

Q. Can you grow grain out there this year?

A. Not on the lakebed.

Q. What is the condition of the lakebed this year?

A. Well, it is in fine shape. If it keeps going it will be a wonderful crop there this year. The water is starting to recede. The same conditions is there

(Testimony of Marcellus B. Hayes.)

now as when it grewed good crops. If it keeps on it will be a wonderful year for crops this coming year.

Q. Have you any assurance that next year that won't remain covered with water up to the meander line? [134]

A. No, but I say if conditions remain as they are at the present time another season like this you can farm that lake out there to the center of it.

Q. There has been water there on that land for the last four or five or six years, hasn't there?

A. Oh, yes, longer than that; longer than that.

Q. Mr. Hayes, I will point out on the map here and ask you ——

A. All right. (witness approaches map Government's Exhibit 1.)

Q. Have you ever had any fences down here (indicating)? Has that dike been fenced?

A. Yes sir.

Q. When?

A. Well, '31, '32, '33, during the years. You can kind of see the marks here now. You come plumb to the center of the lake. That is our fence there (indicating).

Q. Oh, you fenced in more than this?

A. We had a fence there, a fence there kind of angled off (indicating). There was no established line through there. It came through there. I don't know whether it would be on the line of this fence that they have got marked there or not, but it wasn't surveyed, but we aimed to get all of our land.

(Testimony of Marcellus B. Hayes.)

Q. Now, how many years was that fenced down there?

A. Well, I couldn't tell you that.

Q. Approximately.

A. It was fenced there until the water got so high it washed the fence out. [135]

Q. During the high water the fence was washed out?

A. The fence was washed out, washed the posts out of the ground.

Q. Is there any fence there now?

A. Yes, sir.

Q. Whereabouts is the fence now?

A. Well, the fence follows out there pretty good. This curves out there, and they claimed this land. It was an old homestead here, comes to the center of the lake, —you can see here—but just where this fence was on the north and south and east side I wouldn't undertake to say.

Q. Isn't it fenced up here (indicating)?

A. There is a fence here, and the Government has a fence right along here (indicating).

Q. That is the meander line fence?

A. That is the meander line fence; but we used to have a fence across here (indicating). We are putting one up there now, two men digging posts there today.

Q. This fence along here, is that the fence that it was testified to that the earth would cover the fence?

A. Yes, sir. We raised, put the fence up on top

(Testimony of Marcellus B. Hayes.)

of this dike here, the same way on this side here. The weeds and stuff drifted up against the fence, then when it got extremeny dry the ground came out here and built up.

Q. During that time the cattle could walk across the fence? [136]

A. Well, if they didn't keep building it up they could.

Q. Did you keep building the fence up?

A. Yes, we have got fences on top of fences now.

Q. About how high are they now?

A. Well, there has been a fence there all the time, you can see that, and it goes up to here, and this here is the Government fence along down here (indicating). They tore our fence down and put up what they considered a better fence.

Q. Now, on the upland—is there any greasewood on the upland? A. Yes sir.

Q. About how much?

A. Oh, I never measured it, but I would say there is sixty or seventy acres there.

Q. And is that where you have the grain growing this year up on the upland?

A. No sir, the grain is right here on this forty that runs out west there.

Q. About how much fence have you got there?

A. Oh, we've got thirty, thirty-five acres. Never measured it. This here is all in oats, this part of that forty there (indicating). There's anyhow, I would say, thirty-five acres of oats, good grain, there, — oh, not too good, but good average crop.

(Testimony of Marcellus B. Hayes.)

Q. This lake is a good deal lower than the surrounding land there, is it not? [137]

A. Well, the elevation, I wouldn't undertake to tell you that. It is lower. That is lower.

Q. The water stays in there a great deal longer than it does in other parts of the land, doesn't it?

A. On the lakebed?

Q. Yes.

A. Yes. Not so awful much longer. The lakebed is more of a uniform bog. When it dries up there the lakebed is level, pretty level.

Q. Does the water evaporate or does it run off?

A. It dries out. When you start to farm, the wind comes from the south and southwest, it flows out there, and then it goes back.

Q. Where does the Blitzen River come in in regard to your place?

A. Well, it is quite a long ways, right across south, on the south side. If I had time here I would show you.

Q. Well, you take the time. A. What?

Q. You take the time to show me where it comes in there.

A. Are you acquainted in that country?

Q. No.

A. You wouldn't know where the Sod House was or the Big Spring, or anything of that sort?

Q. I am asking you, Mr. Hayes.

A. Well, I know, but I want to find out if I would show you [138] whether you would know if I was right.

(Testimony of Marcellus B. Hayes.)

The Court: Don't argue, Mr. Hayes. Just tell him what he wants to know.

A. Well, if I could find the Stringer place or the Marshall place I could show you exactly. Here is—what is this here (indicating)? Houghton?

Q. (By Mr. Fuller): Houghton.

A. Well, the Hill Brothers, Clyde Hill lived about three-quarters of a mile west of the Big Spring, and the Blitzen River runs into the Big Spring and then flows on out into Malheur Lake.

Q. In other words, the Blitzen comes in about opposite from your place, is that right?

A. Pretty much right, yes.

Q. So that would mean that this end of the lake would fill up sooner than the other, wouldn't it?

A. Well, when it comes out here it takes off here towards Mud Lake. It comes out of the Blitzen and flows out on that land there and out towards Mud Lake, and when that is filled it backs up.

Q. Is that also towards your land?

A. No, as I said awhile ago, the bed of Malheur Lake is practically level and when it get out there it spreads in all directions,

Q. Well, spreads towards your place also? [139]

A. Yes, sure, but not too soon. There's the big channel that goes down through Hill's place there and that goes toward the north country.

Q. Carries it off toward your place?

A. Well, some it does. It doesn't carry it all off.

Q. Now, you testified that you wintered your cattle on this particular tract of land, is that right?

(Testimony of Marcellus B. Hayes.)

A. Partly. I wouldn't say that we have kept all of our cattle there every winter. No, I never said that.

Q. Well, how many cattle would you feed there during the winter?

A. Well, sometimes we would winter right around five hundred head of cattle, kept them there the whole blessed winter through.

Q. For how many months would that be?

A. Well, that would be three months of it, when we have plenty of hay, but some years that we were over-stocked—there was years that we had over a thousand head of cattle.

Q. On this land?

A. No, sir, I am talking about Harney Valley.

Q. I am talking about this particular land.

A. No sir, but we wouldn't have them all there.

Q. Have you leased any land on the south side of the lake for the purpose of wintering cattle?

A. One year south of the lake, the old Gibson place. After we got through pasturing here, that is, along in around after January and February, —I wouldn't be exact on the date—we [140] leased the old Gibson place, —that is right close to where Hill's is; you remember where that is there—and bunched that hay and we put them over there and finished them up over there on that bunched hay.

Q. At the present time you are leasing some land up here (indicating), aren't you?

A. A hundred and sixty acres, what they call the old Bill Hayes place. This fence that goes up on this

(Testimony of Marcellus B. Hayes.)

side there, we go from there and tie onto that drift fence, the Government fence.

Q. When you say you winter cattle there, you winter them about three months? That is what the wintering of cattle means, is that right?

A. Well, that is an average feeding of cattle, is three months.

Q. You may take the stand.

A. Of course, in the fall of the year you have your cattle together, you have them in close, more than any three months.

Mr. Fuller: I think that is all.

Redirect Examination

By Mr. Hicks:

Q. Mr. Hayes, —can you hear me from here? I just have a few questions. Can you hear me? Maybe I can walk up a little closer to you.

A. Stop there. That is good enough. [141]

Q. All right. Mr. Hayes, counsel asked you if there was a certain year when the fences washed out on this tract of land, or a certain fence or part of a fence washed out on this tract of land; is that true?

A. In the lakebed?

Q. Yes, lakebed lands.

A. Well, practically all the fence went down, after the water came in, and we quit going down there and using that land.

Q. About what years was that?

A. Oh, '39, '38 or '39, somewhere along there. I wouldn't be definite on that date, but the land that we own there at the present time, the land that the

(Testimony of Marcellus B. Hayes.)

cattle we are going to put there in a few days, we have always kept that fence up.

Q. What I want to ask you was whether there was a single year up until 1935 when there was ever any fence washed out on that tract of land?

Mr. Boylan: If the Court please, I object to that as too far distant in time.

The Court: Overruled.

A. You mean at the north part of the land?

Q. (By Mr. Hicks): Any of the lakebed land?

A. Oh, in '35?

Q. Up to '35 was there ever —

A. No sir. We kept it up. It might have washed out or might have knocked down, but we had someone that rode the fence and [142] looked after it. We never put out cattle down there and turned them loose.

Q. I neglected to ask you about the soil on this lakebed land. Can you tell the jury something about that? A. The soil?

Q. Yes, the quality of soil?

A. You want the color of the soil?

Q. The quality of the soil? A. A-1.

Mr. Hicks: That is all. No further questions.

Mr. Fuller: I think that is all.

Mr. Hicks: Thank you, Mr. Hayes.

(Witness excused.)

Mr. Hicks: We will call Mr. Ausmus. [143]

J. O. AUSMUS

was thereupon produced as a witness in behalf of the defendants Hayes and, having first been duly sworn, was examined and testified as follows:

The Clerk: State your full name.

A. J. O. Ausmus.

Direct Examination

By Mr. Hicks:

Q. Mr. Ausmus, what is your occupation?

A. Farmer.

Q. How long have you been a farmer?

A. Twenty years.

Q. What has been your familiarity with the Malheur Lake region, including this tract of land that we are concerned with in this lawsuit?

A. I didn't quite get that.

Q. How long have you been familiar with this tract of land that we are involved with in this proceeding?

A. Oh, I have known it forty years.

Q. State whether or not you used to live down on Malheur Lake yourself?

A. I lived very near there and went to school within a stone's throw of this place.

Q. How long did you live down on the lakebed there?

A. Oh, down on the lakebeds, about thirty-four years, I believe.

Q. Sort of grew up there as a boy, did you? [144]

A. Yes.

Q. Now, Mr. Ausmus, tell us about the condition

(Testimony of J. O. Ausmus.)

of this tract of land—and let me say this to you, Mr. Ausmus: We have got to confine our testimony to this particular tract of land—tell the jury about the grasses, if any, and the hay, if any, and that sort of thing, on this tract as you have known it back that far and, I take it, up to the present itme, if that is correct.

Mr. Boylan: If the Court please, it seems to me that counsel should be confined to a reasonable length of time prior to the filing of the Declaration of Taking. I see no reason for going back forty years.

The Court: Well, I don't think it makes much difference, with this type of question. As a matter of fact, the whole district is being gone into, and, besides, from the beginning by counsel in his opening and I think that you can just segregate this out and try it in a vacuum; therefore, I will permit this testimony, unless the cumulative effect of it, in my opinion, makes it immaterial.

Mr. Hicks: Do you understand the question, Mr. Ausmus?

A. Yes. Well, when I first knew it there was more sugar grass and more finer meadows there than there are or has been in later years. Preceding the dry period there was more grass, finer grasses, than there are at the present time: During those drier years, then, they developed a considerable portion of that, [145] and since the dry years the grasses have come back somewhat and they are courser than they used to be in my recollection.

(Testimony of J. O. Ausmus.)

Q. Well, could you tell us, if you know, from your observation on this tract, what the production has been from year to year in hay, and that sort of thing, forage grasses?

A. Well, there used to be big haystacks there, probably three or four or five tons of haystack, but more recent years they have bunched them instead of stacking them.

Q. Have you yourself farmed down there?

A. Not on this tract.

Q. Not on this tract; but are you familiar with the conditions down there? A. Yes.

Q. Is there any advantage to the stockman in bunching hay, raking and bunching it, rather than stacking it?

A. Yes, there seems to be.

Q. And what is the advantage?

A. Well, there is less cost, and the cow can feed any time she wants, and it seems to improve those grasses to let them lay in bunches, and it rains on it, through chemical change it seems to improve the feeding value of it; they will eat some of that coarse stuff that they wouldn't otherwise. Sometimes it goes into a sort of ensilage.

Q. Now, have you been familiar with the tract the last few years, Mr. Ausmus? [146]

A. The last six or seven years, no, I haven't been much on that in six or seven years. I was down there this summer.

Q. Well, you mentioned something about some grain production on this particular tract.

(Testimony of J. O. Ausmus.)

A. Yes.

Q. Could you tell the jury about that?

A. Yes, I saw some——

Mr. Boylan: If the Court please, I ask that he be confined to a reasonable time and that he designate the time.

The Court: Well, I think that Mr. Hicks should make his questions more definite, but then I don't seem to be able to.

Mr. Hicks: I didn't want to lead, your Honor.

The Court: Well, all right, you could ask him within the last three years and that wouldn't be leading him.

Q. (By Mr. Hicks): Well, Mr. Ausmus, was there any grain production down on this tract as early as 1929, to your knowledge?

Mr. Boylan: Object to that as too far back in time.

The Court: Overruled. Everybody knows that this lake went dry in 1931. It is part of the history. You can't escape it by objecting to the fact that it is twenty years back. Go ahead, answer the question.

A. Yes, I knew grain to grow there about '31.

Q. (By Mr. Hicks): Well, now, from the first time you knew the grain to grow there, whatever the year was, will you go ahead progressively, year by year, as best you can state it, [147] and tell us about grain production on this particular tract.

A. Well, I saw a large acreage there in '31, several hundred acres.

The Court: On this tract?

(Testimony of J. O. Ausmus.)

A. Fine grain.

The Court: On this tract?

A. Yes; it would be, really, through almost to the center of the lake.

The Court: No, I am talking about this tract. That is what you are supposed to be testifying about. Do you mean to say that you saw several hundred acres of grain on this tract?

A. This tract reaches the center of the lake. I understand it goes to the center.

The Court: Yes, I understand it does, too. All right, you go over there and mark on the map there where you saw several hundred acres of grain on this tract.

Q. (By Mr. Hicks): Will you step down, please, Mr. Ausmus. Now, with reference to the 1931 crop that you were mentioning, I wish you would point out on the map the area where the grain was growing that you describe as several hundred acres. Are you familiar with the map?

A. Well, I have seen the map before. Well, there was grain growing from near—not far from the cabin where they feed, there, there was grain growing extending straight south. At that time I didn't know exactly where the lines were, but [148] apparently all this south of the cabin down for quite a ways there. I don't know, it must have been—I rode on the tractor with Del there one time—I don't know, I must have been a mile or mile and a half below the cabin. I made one round with him south of his cabin. Now, of course, the lines weren't

(Testimony of J. O. Ausmus.)

marked out or anything, but I do know that it was south of the cabin there for a mile or more, a mile and a half or such.

Q. A mile and a half of what?

A. Distance. That was '31 or '33.

Q. Well, now, after studying the map, do you think you are sufficiently clear as to where the lines were? By the way, were there fences there at that time?

A. Well, not so much. There had some fencing been done. It may have been 1933, but I know I must have been a mile and a half south of his house. I know I made a big round of it down here (indicating).

Q. All right, now, with reference to the area that you have pointed out, could you state what in your opinion were the number of acres on this particular tract that were in actual grain production at that time?

A. No, I don't believe I could, because, you see, it could have been a little east or a little west on some of that. I couldn't say just where those lines were at that time.

Q. Now, while you are at the map, Mr. Ausmus, I want to ask you whether or not there was grain production on the south [149] part of that during any of those years, the extreme south, down near the center of the lake?

A. Well, I think the greater part of this area—now, there is some over here on the west, possibly tule land, that wasn't in grain; there is a little bit

(Testimony of J. O. Ausmus.)

there in tule that possibly marked the west area of that ground, is my recollection.

Q. Now, what would be the east area?

A. Well, that would be in the grain area, the grain tract.

Q. Now, do you see this line down here, Mr. Ausmus, near the center of the lake, that line (indicating)?

A. Yes.

Q. I want to ask you whether or not there was any grain production in any of those areas down in there?

A. Well, in 1933 I am sure the grain extended across that line, a little beyond.

Q. Well, could you tell us to what extent the area was sown and grew grain, that part down to the south there?

A. The acreage?

Q. Well, just approximate it as best you can, if that is reasonably possible?

A. Well, that seems to be a half mile wide and three miles long. Yes, I would think there was several hundred acres in there.

Q. You may take the stand now. Mr. Ausmus, you have mentioned the years '31 and '33, I believe, when there was grain production on this tract. [150]

A. Yes.

Q. Now, can you tell the jury about any other years, '34, '35, and on through, when there was grain production there?

A. Well, yes, there was grain there two or three years after that, but I couldn't state just the years, but possibly '35 and '36, along in there.

(Testimony of J. O. Ausmus.)

Q. Now, referring to these grain crops that you have seen growing on this land, did you actually see those grain crops? Did you examine them?

A. Yes, I was over there and helped harvest them, and was over there a number of times.

Q. Tell this jury about the kind of crops that you saw growing on this particular tract of land.

A. Well, I saw oats and barley as fine as I ever saw grow.

Q. Have you had some experience in growing grain down there yourself, Mr. Ausmus? I don't mean on this tract, but have you had experience in the Malheur Lake region in growing grain?

A. In that region, yes.

Q. Are you familiar with the soil on this tract?

A. Yes.

Q. And how would you say the soil on this tract compares with the other tracts—well, all right, I will withdraw that. How many years experience have you had growing grain down in that region, Mr. Ausmus? [151]

A. Well, when you say "that region" do you mean below the line or——

Q. Anywhere in that region in and around Malheur Lake?

A. I have some grain land within a mile of the meander line that we have raised a number of crops on, and we have been farming more less for twenty years along in there or near there.

Q. Do you mean farming grain?

A. Yes, I have.

(Testimony of J. O. Ausmus.)

Q. You are familiar, I believe you said, with the quality of the soil? A. Yes.

Q. What do you say about the lakebed land here, Mr. Ausmus, as to being grain land and capable of producing grain?

A. I say it is extremely fertile, some of the best.

Q. Best for what?

A. Best for growing grains.

Q. Now, during this I believe you said forty-year period when you were living down there as a boy and on through, did you have opportunity to observe the Hayeses in their use of this tract of land? A. Observe what?

Q. Did you see the Hayeses and their cattle?

A. Oh, yes, I have ridden down there among their cattle a number of years. [152]

Q. And how far is the place that you live in there from this tract of land?

A. Oh, we own land within two or three miles of it.

Q. Could you tell us whether or not every year during those periods you were upon this land, at one time or another, so you could tell us something about what was growing, and so forth?

A. Yes, I used to be down there when I was running cattle. I used to run cattle down in there. I would be down there every year.

Q. And did you see cattle on the place?

A. Oh, yes.

Q. From your knowledge of this particular tract of land and the Hayeses' occupation of it through

(Testimony of J. O. Ausmus.)

all these years, Mr. Ausmus, I want to ask you whether or not you have ever known of a year that they did not have hay down there aplenty to feed their cattle, or plenty of it to feed their cattle?

A. Oh, yes, they always had a lot of feed on that piece of land.

Q. Would that be true of certain years, or——

A. No, just consistently every year.

Q. Was that true during the dry period?

A. Yes, they had lots of feed down there then too.

Q. And it was true during the wet period?

A. Uh huh. [153]

Mr. Hicks: That is all.

Cross-Examination

By Mr. Boylan:

Q. Do you remember when was the first time that you were ever on this place?

A. Pretty nearly. I was down there when I was about seven or eight years old.

Q. And you have been on the place every year since then?

A. No, not every year.

Q. Well, how often?

A. Well, when I ran cattle I went down there every year for, oh, fifteen or twenty years, possibly.

Q. Well, that was in the old times before the dry spell, was it?

A. No, that was up to and including the dry years. I had cattle then.

Q. I see. Well, since the dry years have you been on this place?

(Testimony of J. O. Ausmus.)

A. Well, just once or twice.

Q. Were you there this year? A. Yes.

Q. Were you there last year?

A. No. No, it must have been three or four years ago I went down there after a cow. [154]

Q. How long before that were you there?

A. Well, '38, I guess, was about the last year, 1938.

Q. Since the year 1938, or, in other words, in the last ten years, about that, you have been on this place twice? A. Yes, that is right.

Q. And what was the occasion for you going on the place?

A. I went down after a cow there three or four years ago. Yesterday I went down to look at the place, to look at the forage and grain crop and make an examination of the soil.

Q. You went down yesterday to look it over for the purpose of testifying in this case?

A. Yes.

Q. But you have not been upon the place other than just for that particular purpose and for the purpose of getting the cow three or four years ago during the past ten years?

A. I believe that is right.

Q. So you don't know what has been raised on that place during the last ten years, except as you saw it the time that you went after that cow and as you saw it yesterday, is that right?

A. No, I guess I couldn't say that I had seen it and an eye-witness to it.

(Testimony of J. O. Ausmus.)

Q. You don't know whether Mr. Hayes has raised any grain on this place in the last ten years, do you, except as you may have seen something there yesterday?

A. Well, I pretty nearly know it. [155]

Q. All right, when did he raise grain on this place during the last ten years, other than what you saw out there yesterday?

A. Well, it is my opinion that about '37 was the last crop until this year. I saw that in '37.

Q. So you are satisfied that there was no grain grown on this place from 1937 until this year?

A. No, I don't think there could have been.

Q. Now, I believe you stated that back in 1931 or '33 you went around—what was it? With a combine, or something like that?

A. No, it was in the spring of the year, when he was disking up the bottom there to put a crop in, I made one round with him soon after he started to work on it.

Q. And you started in at the cabin?

A. Yes, just below the cabin.

Q. The cabin is in the vicinity of the meander line, is it?

A. Pretty close to the meander line.

Q. It is on the deeded land, however?

A. Yes, I think so.

Q. And you went how far south?

A. Oh, I think about a mile and a half south and then turned east.

Q. How far east did you go?

(Testimony of J. O. Ausmus.)

A. Well, we must have gone beyond the U. S. line, from the looks of that map there, because we went around quite a large tract of land there. [156]

Q. In other words, you went over onto some adjoining land? A. Well, perhaps we did.

Q. Was there any fence along the east line of this tract at that time?

A. I don't believe there was. No, there wasn't any fence there at that time.

Q. Have you ever seen a fence along the east side of this tract?

A. Well, I don't know that I have. It may have been that there—there was fencing in there all right, but other lands may have been included.

Q. In other words, there were fences——

A. There was some large tracts fenced off there. It was all under fence, you might say, to keep cattle from ranging over it.

Q. But they had no particular reference to this tract of land?

A. I don't know as they did.

Q. Did you run cattle out in that neighborhood?

A. Yes, we had cattle in there at different times.

Q. Did you run any cattle on this land?

A. Yes, some years they would drift in there.

Q. Do you know whether Mr. Hayes had cattle on this land?

A. Oh, yes; yes, he had cattle in there.

Q. His cattle would drift off the land, just the same as yours would drift on it, wouldn't they?

A. Well, down on that lower portion there, the

(Testimony of J. O. Ausmus.)

water would come up in there and the range cattle would drift in there a little while, and later we made some provision, fenced in a little something to keep the outside cattle from coming in there.

Q. Now, when you went this mile and a half south of the cabin, as you have stated, with Del Hayes when he was putting in grain, or whatever he was doing, in the spring there, you didn't go to the center of the lake, did you?

A. No, I don't imagine we did. Really, I don't know.

Q. Did the field go to the center of the lake at that time? A. I don't recall.

Q. Did that field, that grain field, go to the center of the lake?

A. Well, I wouldn't know. I didn't know where the center was at that time. It had never been marked out.

Q. Well, do you know whether Mr. Hayes ever had any grain down there on this place to the center of the lake?

A. No, I wouldn't know whether it reached the center or not.

Q. On the upland or deeded land in there north of the cabin there are a couple of little greasewood knolls there, aren't there? A. Yes.

Q. How much land would you say was in that greasewood patch?

A. Well, I think seventy or eighty acres would catch it all right. [158]

Q. I didn't get it.

(Testimony of J. O. Ausmus.)

A. I think seventy or eighty acres.

Q. Seventy or eighty acres?

A. Yes, that is what I would judge.

Q. And do you know what the growing of greasewood indicates with reference to the soil?

A. Well, it could indicate a percentage of alkali. There is no indication of what the percentage would be from greasewood.

Q. As a matter of fact, you have seen alkali there, haven't you, or evidences of it?

A. I have seen some indications of alkali on those higher knolls, yes.

Mr. Boylan: That is all.

Mr. Hicks: If the Court please, I wanted to make an offer of proof from this witness with regard to the matters that the Court has deemed inadmissible in other cases. Normally, I would ask questions, and so forth, but I do not want to suggest the subject matter that the Court has not gone into. If I could stipulate with counsel I would like to put the matter in at a later time.

The Court: The Court will give you all the opportunity to make an offer of proof relating to the subject matter of which you are speaking, Mr. Hicks, and you need not have the witness on the stand at the time the offer is made.

Mr. Hicks: And I do not have to suggest the questions to [159] him now in order to get the matter in?

The Court: No.

Mr. Boylan: That is all right.

(Testimony of J. O. Ausmus.)

The Court: I must call your attention again to the fact that there is nothing that I have any personal prejudice about having in this record, and the only thing that I have suggested is that there are certain things that are incompetent and if they were put in the record I would grant a mistrial.

Mr. Hicks: Oh, but I don't want to——

The Court: Each time you have made this offer you have stated it was something the Court did not want in the record.

Mr. Hicks: And I beg the Court's pardon.

The Court: I do not care about anything you put in here, subject to what I construe the law to be.

Mr. Hicks: Yes. Thank you, Mr. Ausmus.

(Witness excused.)

Mr. Hicks: Call Mr. Frank Howard.

FRANK HOWARD

was thereupon produced as a witness in behalf of the defendants Hayes, having first been duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Hicks:

Q. Mr. Howard, what is your occupation?

A. I am a civil engineer.

Q. And where do you reside?

A. In Klamath Falls, Oregon.

Q. Do you have any official capacity with Klamath County?

(Testimony of Frank Howard.)

A. Yes, I am County Surveyor.

Q. And how long have you been engaged in that work?

A. I have been County Surveyor since 1936.

Q. Have you done any farming or stock raising, Mr. Howard?

A. I have farmed at Tule Lake.

Q. Now, tell the jury what your experience has been in the appraisal of lands.

A. For two years, under the direction of the State Tax Commission, I had charge of the appraisal of all the agricultural lands in Klamath County, and since then there have been appraisals of more or less of a casual nature that I am called upon to make.

Q. Do we understand you have done appraisal work up to the present time on a casual basis?

A. Yes. [161]

Q. Do you make certain appraisals every year during that period?

A. Yes, I would say I have, several times a year.

Q. Have you done any appraisals at any time on behalf of the Government, Mr. Howard?

A. I am at the present time acting on an appraisal board for the Reclamation Service.

Q. Have you made any particular study of lake-bed lands?

A. Yes, I have.

Q. Is that true of Malheur Lake?

A. Yes, this summer.

Q. Just this summer?

A. Yes.

(Testimony of Frank Howard.)

Q. And where do you live with reference to Tule Lake and Klamath Lake?

A. My home is on the border of Upper Klamath Lake. It is in a small drainage district and where we have the largest dike on the Upper Klamath Lake.

Q. Yes. Now, you are a civil engineer, are you, Mr. Howard? A. Yes.

Q. How long have you been engaged in that?

A. Over thirty-one years.

Q. Now, with reference to your proximity to those lakes down there, have you ever given thought and had experience with regard to engineering problems in respect to lake reclamation?

Mr. Boylan: If the Court please, I object to that unless [162] he confines it to this particular tract of land on Malheur Lake.

The Court: Objection sustained.

Q. (By Mr. Hicks): Mr. Howard, I believe you testified that you had had experience and made some study of lakebed lands as such. A. Yes.

Q. State whether or not lakebed lands have a quality and character that other farming lands that are not lakebed lands have. A. Yes, they do.

Q. Would you outline that, please.

A. Well, it is usually a little different type of soil than your uplands. For instance, due to the different type of vegetation that grows in those lakebed lands, you have a different type of soil and the alluvial deposits are put in there in a little different form than they are in other places.

(Testimony of Frank Howard.)

Q. Well, what about alluvial deposits?

A. Well, they are usually very rich soils, a very rich soil.

Q. Did you examine the soil on this particular tract here, Mr. Howard? A. Yes.

Q. Would you describe it to the jury.

A. It is very similar to our usual Eastern Oregon lakebed lands. Some of it is built up entirely—oh, by vegetation, such as the tule growth, which has made a very heavy peat soil. Other places, where the tules have not grown so long, it is more of an alluvial deposit. However, it is a very rich deposit.

Q. Now, are you referring to this tract of land here? A. Yes.

Q. To the lakebed land, or to the whole body of it?

A. Well, that had reference to the lakebed part of the land, or to that part of the land below the meander line. Now, that above the meander line is partly alluvial and partly has been blown in by the winds, and partly due to vegetation.

Q. Have you ever had experience—if so, to what extent?—with regard to water control on lakebeds?

A. Yes.

Mr. Boylan: If the Court please,—just a moment—if the Court please, I object to that as being immaterial, unless it is confined to this particular tract of land on Lake Malheur.

Mr. Hicks: May I state my purpose?

The Court: Objection sustained.

Mr. Boylan: I move that the answer be stricken.

(Testimony of Frank Howard.)

Mr. Hicks: May I take an exception, and may I make my offer of proof?

The Court: Yes.

Mr. Hicks: On the same terms as before?

The Court: Yes.

Q. (By Mr. Hicks): Mr. Howard, as an engineer, did you make an investigation and study of this particular tract here with reference to the problems that will be presented in controlling the water on this particular tract? [164] A. Yes.

Mr. Boylan: If the Court please, I object to that as being conjectural.

The Court: Objection sustained.

Mr. Hicks: And may I make an offer of proof on that, your Honor?

The Court: Yes.

Mr. Hicks: On the same terms?

The Court: Yes.

Mr. Hicks: May I have an exception?

The Court: Yes.

Q. (By Mr. Hicks): Mr. Howard, did you, at my request and for the purpose of affording testimony in this case, make a study of this tract with a view to appraisal of it? A. Yes.

Q. Did you classify the land for the purpose of that appraisal? A. I did.

Q. Will you tell us the classifications that you found?

A. I divided that into your uplands and into your lakebed lands for the purposes of simplifying the classification and appraisal. In the deeded lands, or that part of the lands above the meander line, I

(Testimony of Frank Howard.)

classified it into four classes of land. There were the ridges, which had the sage or greasewood, and there there was another type of meadow land, open land, where the soil was not quite so good but which were grown over mostly with salt grass [165] and some foxtail. And then there were the lake bottoms, where the water had receded, which are now being used as grain lands. And then there is the good hay land bordering the meander line. Then below the meander line you have the same good hay land as that which I have described as being above the meander line. And then you have another type of tule land where the elevation is a little higher than the actual lake bottom, and then you have the lake bottom, which I have called those lands, oh, below the elevation of about '91.

Q. And did you make an examination of all those tracts, Mr. Howard? A. Yes.

Q. And study the tracts? A. Yes.

Q. And, from your experience and study that you made of these tracts upon the ground and your knowledge of the entire subject, did you form an opinion as to the fair market value of these lands on the 11th day of February, 1947? A. Yes.

Q. Please state what that opinion is.

A. It was \$40,245.

Mr. Hicks: You may take the witness.

Cross-Examination

By Mr. Fuller:

Q. Mr. Howard, at the present time you are the County Surveyor of Klamath County? [166]

(Testimony of Frank Howard.)

A. Yes.

Q. And prior to that time what was your occupation?

A. Civil Engineer, where it was mostly private engineering work.

Q. Do you hold yourself out as a soil expert?

A. No, I don't put myself up as a soil expert.

Q. The two years that you were appraising for the State Tax Commission, what did that consist of, that appraisal?

A. That appraisal consisted of setting up in Klamath County certain bases from which we could assume the actual value of the land at that time, from which the assessor was able to set his tax base.

Q. Do you mean that you appraised certain properties to arrive at this assessed valuation?

A. Our appraisal was for the full value.

Q. Now, in making these appraisals were you aided by a pattern set by the State Tax Commission as to the values of certain fields, certain lands, and so forth?

A. We were given certain formulae which we fitted to the conditions in Klamath County to arrive at our values.

Q. By that you mean that this pattern would state to you that a certain building of a certain size, a two-story frame building, was considered to be worth so much money?

A. Oh, no, in the matter of buildings we actually had a formula from which we actually figured the cost of construction at that period. [167]

(Testimony of Frank Howard.)

Q. How about the land?

A. The same is true of our land. We had to go into these areas and take all factors into consideration. That is, no two parts of Klamath County would be the same.

Q. In other words, though, this formula that the State Tax Commission gave you, that is what you were guided by in making your appraisals?

A. The formula guided us in arriving at the basis which we used for Klamath County?

Q. Did you have any prior experience than these two years with the State Tax Commission?

A. No.

Q. Then you just went out, you might state, green and started appraising land for the State Tax Commission without any previous experience, is that right?

A. We were given a course of training, of course.

Q. How long was that course?

A. Oh, it lasted a month or so, to begin with, then the State Tax Commission came in occasionally to check us to see if we were going right.

Q. Mr. Howard, will you step down to the map here and point out—well, first, before you come down here, when were you on this land for the purpose of making an appraisal?

A. I beg your pardon, I didn't understand your question. [168]

Q. When were you on this particular tract for the purpose of making an appraisal?

(Testimony of Frank Howard.)

A. I was on it in August and then I was on it again last week.

Q. August of this year? A. Yes.

Q. When were you on there in August?

A. I believe it was—it was on Wednesday, August 27th.

Q. Wednesday, August 27th, of this year?

A. Yes.

Q. How long were you on there at that time?

A. We spent—oh, we spent the whole day, or most of the day, on that tract and an adjoining tract which we had to cross back and forth anyway.

Q. On August 27th you were not only doing this tract but other tracts of land?

A. We had one other tract which we had to cross back and forth in order to get in to this one.

Q. You did not spend all your time, then, on this tract, did you? A. No.

Q. Now, what other time were you on the land?

A. On last Saturday.

Q. Last Saturday. How long were you there last Saturday?

A. I was there in the afternoon.

Q. How long? [169]

A. Oh, we left here—we were on there several hours. I don't know just what time it was. It was late in the afternoon.

Q. Now, will you approach the map here. This is the meander line, is it not (indicating)?

A. Yes sir.

Q. Describe what you found above the meander line?

(Testimony of Frank Howard.)

A. I found land which was the high ridges covered with greasewood and salt grass, and then open meadows——

Q. How much, now, of greasewood and salt grass? Where did you find that? Point it out to me.

A. It was approximately this area right in here (indicating).

Q. About how many acres of that would be greasewood?

A. I estimated it at 70 acres.

Q. Seventy acres of greasewood. Now, what value did you place upon that?

A. Ten dollars an acre.

Q. Of that greasewood? A. Yes.

Q. What does greasewood indicate, so far as the soil is concerned?

A. Oh, it indicates that there would be alkali and there would be indications of soluble alkali on top of the soil.

Q. And that is about how many acres?

A. About seventy.

Q. And that would be seven thousand dollars—— [170]

A. No, seven hundred dollars.

Q. ——seven hundred dollars for that alkali?

A. Yes.

Q. Then what else did you find up there?

A. Then I found the open meadow, which was mostly——

Q. Where was that?

A. That is this forty in here (indicating).

(Testimony of Frank Howard.)

Q. How many acres of that?

A. Well, that together with other open meadow along the edge of this greasewood land and along the south part of this, 43 acres.

Q. And how much value did you place on that?

A. Fifteen dollars an acre.

Q. Fifteen dollars on the meadow land?

A. Yes.

Q. What is the total of that?

A. That would be \$645.

Q. All right, what else did you find in there?

A. We found grain land,—that is, lake bottom, in which oats were sown.

Q. A lake bottom?

A. It is an old lake bottom. It is lake bottom of higher elevation than this other.

Q. What lake is that?

A. Well, it isn't a lake. It is an area shown by this high [171] flat area in here (indicating), confined by higher ridges.

Q. A low depression on the upland?

A. It is.

Q. How many acres of that?

A. I estimated 30 acres of grain land.

Q. At how much an acre?

A. A hundred dollars an acre.

Q. That is for the grain land on which grain is growing this year?

A. Yes.

Q. Did you know of grain having been grown there in previous years?

A. No.

Q. Did you know that it was growing there last year?

A. No.

(Testimony of Frank Howard.)

Q. By virtue of the fact that it is grain land you put a hundred dollars an acre on that?

A. Any land that will grow that kind of a crop is worth a hundred dollars an acre.

Q. If it only grows it once in a lifetime?

A. No, not necessarily that, but it indicates that it will grow it again.

Q. Have you ever heard of them growing grain there before?

A. I have heard, as I understand it, that it had grown.

Q. On the upland? [172]

A. In this area here (indicating).

Q. Who testified to that?

A. Well, nobody testified to that here, but I got that from—I don't know as I can identify them, but that is my understanding, that there had been grain growing there.

Q. Have you got anything else in the upland?

A. Yes.

Q. Pardon me, that was \$3,000, that last?

A. Yes.

Q. What else do you have in the upland?

A. I have got 30 acres of good hay land right along this edge near the meander line.

Q. What value did you place upon that?

A. Fifty dollars an acre.

Q. And the total. A. It is \$1500.

Q. Now, is there anything else in the upland?

A. Yes, there is some fencing to be taken into consideration.

(Testimony of Frank Howard.)

Q. Where is that fencing on the upland?

A. Well, in estimating the fence on this upland I took the total of the exterior band and, as a usual thing, the owner of the land can only claim half of the fence, so I gave him half of the exterior fencing, and then this meander fence.

Q. What value did you put on that?

A. Fourteen hundred dollars. [173]

Q. That is the half value?

A. Well, that includes the half value, and the value of this fence (indicating).

Q. What buildings did you find on the land?

A. I didn't find any.

Q. And the lakebed, how did you classify that?

A. Well, there is good hay land and then there are certain——

Q. Where is the good hay land?

A. Well, it lies from this meander line down to about in here (indicating).

Q. How many acres of that?

A. There's 200 acres in there.

Q. Is that all hay land?

A. That has been cut there this year.

Q. Does that extend over into here? Is that hay land in there (indicating)?

A. No, that is not there. That is the part that I started to say that I excluded from the good hay land. That is another lake bottom.

Q. Your hay land just goes around there (indicating), is that right? A. Yes.

Q. Two hundred acres. What is the value?

(Testimony of Frank Howard.)

A. Fifty dollars an acre.

Q. What is the total? [174]

A. Ten thousand dollars.

Q. Now, this other area in here that you call another lake bottom (indicating)?

A. Well, that isn't in hay land. At the present time it is heavy to tules and it is a very heavy peat soil, and I gave it the same price that I did the other.

Q. What was that?

A. Fifty dollars an acre.

Q. How many acres in that?

A. About 168 acres. That also includes some land down here (indicating).

Q. What is the total, then?

A. Eight thousand four hundred dollars.

Q. I understand, now, that is for the tule land that you just mentioned? A. Yes.

Q. Now, below that what did you find?

A. That is what I classified strictly as a lake bottom, from about this meander line of—or, not meander line—or this contour line of an elevation of '91 on out. That is mud and scattered tules at the present time.

Q. Anything growing there outside of tules?

A. Beg your pardon?

Q. Anything growing there outside of tules?

A. Oh, along the edges, where the water has dried up, it is [175] showing indications of certain weeds that are turning green.

Q. Very damp down there at the present time?

(Testimony of Frank Howard.)

A. Yes.

Q. Did you get down on it?

A. No, I couldn't get out on it.

Q. How many acres in that?

A. I estimated 560 acres.

Q. And what value per acre did you place on that?

A. Twelve and a half an acre.

Q. And the total?

A. Thirteen thousand seven hundred fifty dollars. (sic)

Q. In other words, thirteen thousand dollars for this land that is practically mud at the present time?

A. Well, there's lots of tules in there.

Q. You can't get to them at the present time?

A. Well, stock can later.

Q. Any fences down there?

A. Yes, this fence seems to be in (indicating).

Q. Seems to be?

A. Yes, as far as we could see, that fence is in.

Q. How far down did you go?

A. Well, just as far as we could get here on this part (indicating).

That is the fence in the center you are talking about?

A. Yes. [176]

Q. Now, I am talking about the fence on the outside here (indicating).

A. There is a fence there at least part way, but I have forgotten just how that runs and I didn't make a note of it.

Q. Where is that part way?

(Testimony of Frank Howard.)

A. I notice the flags, that, is the red flags, indicating this line down here (indicating).

Q. Did you examine those fences?

A. I examined this one, but I believe that I thought I was over this line (indicating).

Q. You don't know whether you were here or here (indicating)?

A. Yes, I was. This is a stack yard, an old stack yard, here. We were here (indicating).

Q. You may take the stand. Did you put any value on that fence below the meander line?

A. I put \$900 on the fence below the meander line.

Q. Those figures that you just gave to me now, what do they total?

A. Forty thousand two hundred forty-five dollars.

Q. That is the figure that you placed on the various tracts of land here (indicating)?

A. Yes, that is the total.

Q. I believe you said that on the upland you saw some sage growing, is that right?

A. I believe it was along that upper forty, I saw just a few [177] patches of those little—I think they call it rabbit sage.

Q. It wasn't very noticeable, was it?

A. No, it isn't?

Q. Practically all that area up there was grease-wood, isn't that right? A. That is right.

Mr. Fuller: That is all.

(Testimony of Frank Howard.)

Redirect Examination

By Mr. Hicks:

Q. Mr. Howard, that fencing on which you put the valuation of \$900, is that in respect to all the lakebed lands below the meander line, clear down?

A. I don't understand which——

Q. Counsel asked you about a \$900 valuation on some fencing.

A. Oh, that was for the fencing below the meander line, yes.

Q. Does that mean the lateral lines of the tract?

A. Yes.

Q. Clear down to the center of the lake?

A. Well, the fence on the east side seems to have been obliterated, as near as I could see.

Q. Well, how much fence was included within that figure? A. How much fence?

Q. How much fence, yes?

A. There were something over 900 rods. [178]

Q. Nine hundred rods of fence?

A. Yes.

Q. Which you apparently valued at a dollar a rod, is that right? A. Yes.

Q. Sixteen feet in a rod?

A. Yes, sixteen and a half.

Q. That included the wiring, the posts, and everything? A. Yes.

Mr. Hicks: That is all.

(Testimony of Frank Howard.)

Recross-Examination

By Mr. Fuller:

Q. Just a minute. Now, where is that 900 rods of fencing? Will you point that out?

A. The only fence that I considered in here was this stretch that comes from this corner out to here and down through like this (indicating).

Q. How far does that come down?

A. I could see these posts away out here, and we were told that it went away out to this corner (indicating).

Q. Well, did you see the condition of the fence?

A. We could see that there was a fence, yes.

Q. Now, how far down that fence were you?

A. We were clear down here as far as we could get (indicating).

Q. How far was that?

A. That was down to about the '91 meander.

Q. Down about there (indicating)?

A. Yes.

Q. Then from there you could see that?

A. We couldn't see all the fence, no.

Q. How far is that down there?

A. You want to know how far it is?

Q. Yes.

A. That is about 520 rods from right there (indicating).

Q. How far is that in feet?

A. Times sixteen and a half,—that is about 8,500 feet.

Q. About a mile and a half?

(Testimony of Frank Howard.)

A. It is, yes, a little over a mile and a half.

Q. And you could see down there a mile and a half?

A. From up on here, from up on this knoll, yes sir, quite high here, an old stack yard, and then standing on top we could see down here for at least a mile (indicating).

Q. There's tules growing down there, aren't there? A. Yes, there's tules down there.

Q. Higher than the fence?

A. Yes, somewhat, but, nevertheless, you could see the indications of fence.

Q. Could you see the wire, or did you just see the fence posts?

A. We could see the fence posts.

Q. You don't know whether there was wire on it or not, do you? [180]

A. No.

Q. Then how could you place a dollar a rod on it, when you don't know whether there was wire on it?

A. Well, one thing I had to go on here was a map which was made by the Bureau, which indicates a fence, and in most cases we have found it correct.

Q. Did it say there was wire on the fences?

A. It indicates a fence.

Q. It indicates a fence when the map was made?

A. Yes.

Q. It doesn't tell you what condition it was in, does it? A. No.

(Testimony of Frank Howard.)

Q. And without seeing it you put a value of a dollar a rod on that? A. Yes.

Mr. Fuller: That is all.

Mr. Hicks: No further questions.

(Witness excused.)

The Court: A short recess, ladies and gentlemen.

(The jury was thereupon excused.)

The Court: Court is in recess.

(Short recess.)

Mr. Hicks: Call Mr. R. D. Cozad, your Honor.

R. D. COZAD

was thereupon produced as a witness in behalf of the defendants Hayes and, having first been duly sworn, was examined and testified as follows:

The Clerk: State your name.

A. R. D. Cozad.

Direct Examination

By Mr. Hicks:

Q. Where do you reside, Mr. Cozad?

A. Canyon City, Grant County.

Q. That is in Eastern Oregon? A. Yes.

Q. How long have you lived in Eastern Oregon?

A. All my life.

Q. Did you ever live in Harney County?

A. Yes, I have.

Q. Over what period of years?

(Testimony of R. D. Cozad.)

A. Well, I lived here for seventeen years, from '17 to '34.

Q. Did you have any experience in farming, in the growing of cattle and livestock?

A. Yes, I did.

Q. What kind of work were you engaged in here during that 17-year period?

A. Well, farming and stock raising and feeding beef cattle.

Q. You had a ranch here, did you? [182]

A. Yes, I did.

Q. Where was that ranch with reference to Malheur Lake?

A. Well, about twelve or fourteen miles north.

Q. State whether or not throughout your whole life you have been rather closely associated with the growing of livestock?

A. Yes, I have.

Q. And your occupation at this time is what?

A. I am with the State Highway Department, right-of-way Agent, purchasing lands and making property settlements and appraisals.

Q. Appraisals, did you say? A. Yes.

Q. State what your main duties are in connection with your work in behalf of the State Highway Commission?

A. Well, buying lands for road purposes, state highway purposes, and for park sites and material sites and quarries, and so forth.

Q. Well, to what extent does that lead you into appraisal work?

A. Well, in ascertaining the price of property,

(Testimony of R. D. Cozad.)

in nearly every unit we appraise the overall cost of the unit, or the price of the whole land, to determine what the parcel we take should be worth.

Q. And you first appraise the whole property of which you take a part?

A. The immediate part, yes. [183]

Q. And then ascertain the price of the tract you take? A. Yes, sir.

Q. And you have been doing that for how long?

A. Nearly seven years.

Q. Continuously? A. Yes.

Q. Aside from your experience as an appraiser, have you appraised otherwise?

A. Yes, I have. I appraised land for the Federal Land Bank for a good many years in Harney County, and after the World War I, under the soldiers' bonus act I appraised land a few years here.

Q. Now, in making those appraisals did you have occasion to appraise stock lands?

A. Pardon me?

Q. In making those appraisals did you appraise grazing lands and stock-raising lands?

A. That is right.

Q. Farming lands? A. That is right.

Q. All types of farming lands?

A. That is right?

Q. Did you, at my request, examine the tract that we are involved with here in this lawsuit?

A. Yes, I did.

Q. And did you go down there at my request

(Testimony of R. D. Cozad.)

and examine it and [184] investigate it and study it? A. Yes, I did.

Q. With a view to appraising it? A. I did.

Q. And do you have an opinion, from the investigation that you made there, as to the value of this tract of land, Mr. Cozad? A. Yes, I do.

Q. Now, in arriving at that opinion, will you tell me how you approach the problem and how you arrive at it?

A. Well, I sort of classified that land, the surveyed lands and the lower lake lands, into three or four different classifications in each tract. I found greasewood and salt grass knolls, and a small area in sagebrush that is not in that particular piece, and part of it in meadow or wild hay, a good deal, and some of it in oats.

Q. Now, in making your evaluation of this tract how did you consider it? By that I mean as a stock-raising matter or an overall purpose, or what?

A. Yes, I tried to make it a conservative estimate as to what I saw of it down there as a stock-raising deal.

Q. And in your opinion what is the value of that tract as of February 22, 1947, the fair, reasonable market value of the tract,—wait a minute; that is February 11th, pardon me, 1947?

A. Twenty-three thousand eight hundred eighty-five dollars forty cents. [185]

Q. Twenty-three thousand eight hundred eighty-five dollars forty cents?

A. Twenty-three thousand eight hundred eighty-five dollars forty cents.

(Testimony of R. D. Cozad.)

Q. For the whole tract? A. That is right.

Mr. Hicks: You may take the witness.

Cross-Examination

By Mr. Boylan:

Q. That is the full, fair market value of the land as of February 11, 1947? A. As I see it.

Q. Without any restrictions upon it whatever?

A. No.

Q. Now, Mr. Cozad, do you know what the annual rental value or use value of this land is?

A. No, I do not.

Q. In this case, Mr. Cozad, the Government is taking the land by a Declaration of Taking which was filed on February 11th of this year, I believe, subject, however, to a five-year use or tenancy in livestock ranching operations, such as harvesting operations and feeding of hay to stock for that portion of this land, being the surveyed land and Special Master Tract No. 48, in the bed of Malheur Lake, for the period of five years from [186] October 9, 1946, in accordance with the rules and regulations of the Secretary of the Interior. Did you make an appraisal of this land——

Mr. Hicks: Your Honor, I want to object to this. This is not proper cross-examination. We did not go into that on direct examination. He can make him his witness, if he wants to.

The Court: Well, your duty, as I understand it, is to prove the value of the land which is to be taken. As I understand, everybody is agreed here that the land taken is the land subject to the reser-

(Testimony of R. D. Cozad.)

vation. While the objection was not made at the time you asked the question and therefore I paid no attention to it, I think you have no right to object to this line of cross-examination.

Mr. Hicks: Very well.

Q. (By Mr. Boylan): Well, did you make your appraisal of this land subject to that reservation, Mr. Cozad? A. No, I did not.

Q. Do you have any means of ascertaining at this time what the fair market value of this land would be subject to that five-year reservation?

A. Well, I might make a guess at it. The first time—I had this appraisal made a few days ago, and the first time I knew anything about this reservation or any deal that was made there I heard in the courtroom here awhile ago. I don't know——

Q. Well, were you informed as to what it was that you were [187] appraising at the time that you were sent down there to appraise it?

A. I was asked to make an appraisal on the land as I saw it out there.

Q. Do you know what that Special Master Tract No. 48 is, how much of the land that consists of?

A. Is that this tract?

Q. Well, that portion of this tract which is known as Special Master Tract No. 48,—do you know what that consists of?

A. I had this particular tract. I don't know what the number of the tract is, but I know what is in this tract of land that I have appraised.

Q. Well, for your information, I will state that the Special Master Tract No. 48 does not include

(Testimony of R. D. Cozad.)

this entire tract of land that is being taken; but do you know what Special Master Tract No. 48 is?

A. No; I made my appraisal on the surveyed lands and the lakebed lands that are shown on this map here, 1101 acres.

Q. In other words, the appraisal that you have put upon this land that you have testified to does not include or cover the estate that is taken in this land by the Government, is that right?

A. Not at all.

Q. Well, Mr. Cozad, would the value, just as a general matter, without putting any figures on it, would the value of this land [188] with that reservation on a portion of it be the same as the value that you have put upon it?

A. Well, it probably would not.

Q. Would it be greater or less?

A. Well, it would be some less.

Q. Are you able at this time to say how much less?

A. I would rather not until I study it a little bit.

Mr. Boylan: If the Court please, in this case the witness has testified to something else than the property that is being taken and he has stated that he is not in a position to testify to the value of the property that is taken as of the date of the taking. I therefore move the Court to strike his testimony and instruct the jury not to consider it, it not being the property under condemnation.

The Court: Well, wouldn't that apply to all the testimony that has been taken so far?

(Testimony of R. D. Cozad.)

Mr. Boylan: I think probably it would, your Honor.

The Court: I think so, too, and, under the circumstances, there being no objection at the time that the questions were asked, the Court overrules the motion to strike. However, I caution the jury that this testimony is not to be taken without some very considerable consideration upon your part as to the reservation that is in here in the Declaration of Taking, a very important reservation.

Mr. Boylan: Might we have an exception, your Honor? [189]

The Court: Yes.

Q. (By Mr. Boylan): You were on that property recently, I assume? A. Yes.

Q. I believe you testified that you lived in this county until 1934? A. Yes, I did.

Q. Were you familiar with this land at that time?

A. Yes, I have been familiar with that land, more or less, for many, many years.

Q. With this particular tract of land?

A. That is right.

Mr. Boylan: Is there any—well, that is all, Mr. Cozad.

Mr. Hicks: Thank you, that is all.

(Witness excused.)

Mr. Hicks: Call Bell Hayes for just a few questions, your Honor. Mrs. Hayes, will you take the stand. [190]

MARY I. HAYES

one of defendants herein, was thereupon produced as witness in behalf of the defendants Hayes and, having first been duly sworn, was examined and testified as follows:

Direct Examination

Mr. Hicks: Will you please mark those.

(Three photographs, so produced, were thereupon marked for identification as Defendants' Exhibits 7, 8 and 9.)

By Mr. Hicks:

Q. Mrs. Hayes, you are the wife of Marcellus B. Hayes? A. I am.

Q. And you are one of the defendants in this case? A. Yes.

Q. And what is your age, please?

A. Seventy-three past.

Q. Now, are you familiar with the land that is involved in this proceeding that the Government has taken? A. Well, yes.

Q. Did you hand me some pictures of grain crops—of a grain crop that was grown down on this very land? A. I did.

Q. I hand you Exhibits numbered 7, 8 and 9 and ask you to examine those pictures.

Mr. Boylan: If the Court please, before there is any [191] testimony given as to those pictures I think that counsel should inquire into the time and place, and anything further, before there is any statement made with reference to them.

Mr. Hicks: I am going to do that. I simply

(Testimony of Mary I. Hayes.)

asked her if those were the pictures she handed me, I believe. That is all I intended to ask her.

The Court: Well, you should tell us what years they were taken.

Q. (By Mr. Hicks): Yes, could you tell us in what years those pictures were taken?

A. In 1931.

Q. And did you see the land, the area shown in those pictures, in 1931? A. Yes.

Q. And do those pictures correctly show the land as it was out there at that time?

A. It does.

Mr. Boylan: If the Court please, the testimony does not identify the place, whether these pictures were taken on this land or not.

Q. (By Mr. Hicks): Well, Mrs. Hayes, do you know for sure that these pictures do show this very tract of land that the jury is concerned about here?

A. Well, they certainly do. They were taken at that time down there and finished. [192]

Q. You are familiar with that land, are you?

A. Yes.

Q. And how many years have you been familiar with it, Mrs. Hayes? A. With that land?

Q. Yes.

A. Well, we bought the land in 1910, and we had it rented three years before. I have been familiar with it ever since.

Q. And have you owned and operated it ever since? A. Yes, sir.

(Testimony of Mary I. Hayes.)

Q. Do you know the area where this land is located that is shown on the pictures?

A. Well, about, yes. I know one of them in particular and I was down on it when they was combining,—of course, I couldn't designate it by number, or anything like that, but I was down there when they were combining, saw that combine running down there.

Q. Well, you see, our concern is that you know what is shown by these pictures, to be sure that it was on this land that is involved here.

A. Yes, sir.

Q. And that the pictures correctly reflect and represent what appeared there at that time.

A. Yes, sir.

Q. Is that all true? [193]

A. That is true.

Mr. Hicks: Would the Court like to examine the pictures? I would like to offer them.

Mr. Boylan: If the Court please, I object to the introduction of these pictures, for the reason, first, that they are too far away from the present time, or the time of the taking, in point of time to be of any value in estimating the value of this land at the time of the taking, which was early this year. 1931 was some sixteen years ago, and, as the evidence has shown, it was under an extraordinary climatic condition which is entirely different from the climatic condition that has been prevalent for the past ten years. We feel that those pictures are not proper to go to a jury.

(Testimony of Mary I. Hayes.)

Mr. Hicks: Very well, your Honor.

The Court: Well, there are two pictures that I am going to exclude because they have absolutely nothing to do with it at all.

Mr. Hicks: I will withdraw that.

The Court: Now, as to Exhibit 9, Mrs. Hayes, did you take this picture? A. No, sir.

Q. Who took it?

A. I think George Pierce took it, but I wouldn't be positive.

Q. Were you there at the time?

A. No, sir. [194]

Mr. Hicks: We withdraw the offer, your Honor. That is all.

The Court: Objection sustained.

Mr. Hicks: That is all, thank you, Mrs. Hayes.

Mr. Boylan: No cross-examination.

Mr. Hicks: That is all.

(Witness excused.)

Mr. Hicks: We rest, your Honor. We rest.

(Defendants Hayes Rest) [195]

Mr. Fuller: Call Mr. Toucey.

BERT J. G. TOUCEY

was thereupon produced as a witness in behalf of the plaintiff herein and, having first been duly sworn, was examined and testified as follows:

The Clerk: Will you state your name?

A. Bert J. G. Toucey.

Direct Examination

By Mr. Fuller:

Q. Mr. Toucey, by whom are you employed?

A. By the U. S. Fish and Wildlife Service.

Q. And how long have you been so employed by them?

A. Since 1931, except for five years in the service.

Q. What were the five years that you were in the service? A. From 1941 to 1946.

Q. Then you were employed from 1931 to '41 and from '46 up to the present time, is that right?

A. That is correct.

Q. Now, Mr. Toucey, are you familiar with the particular tract of land that is the subject of this condemnation suit? A. I am.

Q. When did you first become acquainted with this particular parcel of land?

A. In the summer of 1931; that is, part of it.

Q. Were you down here on the lakebed that summer? A. I was.

Q. What were you doing here at that time?

A. I was engaged in the topographic survey of the Malheur Lake, Mud Lake and Harney Lake areas and was actually doing instrument work on a

(Testimony of Bert J. G. Toucey.)

plane table that made the map that was compiled at that time.

Q. Is this the map that was compiled at that time?

A. That is the map of Malheur Lake that was compiled at that time.

Q. In the year 1931? A. That is correct.

Q. And did you do any particular work on this particular tract of land?

A. I worked on the south end of this tract of land.

Q. Now, have you known this tract of land since that time?

A. I was on that tract of land again in 1937 and also in the fall of 1938.

Q. Now, will you describe this particular tract of land, to the best of your knowledge, as it appeared in 1931?

A. Well, in 1931 the area that I worked on in particular was to the south of that area, and as we worked up——

Q. Would you mind pointing that out on the map?

A. The area that I worked on in particular was this area down in here (indicating). As we worked east from the west there and got into this country that is shown as being flat due to [197] the lack of density of contours it became—I mean we approached an area that was barren of vegetation; it was drying up, the entire area was dry except for a very small area right around the mouth of Blitzen

(Testimony of Bert J. G. Toucey.)

River. That area had a white dust on top of it at that time, up until you got to this area where the grain fields were.

Q. Do you recall ever having seen grain grown on this particular tract in 1931?

A. I would like to state it this way, that I mapped the area that is bounded by this line as shown on this map and subsequent to that the boundaries of this ownership have been plotted on there.

Q. Well, where in reference to that line which you plotted on this map was the grain grown?

A. To the east of that line.

Q. To the east of that line, and not on this particular tract?

A. Except for this small area right in there (indicating).

Q. Right in there. Now, in 1934 I believe you said you were again familiar with this tract?

A. 1937.

Q. 1937. Will you describe the conditions as you found it at that time?

A. Well, at that time we were doing some surveying on this high ground across here. In other words, at that time we did some work at the north end of the area, and particularly on this [198] high ground that we rode across yesterday.

Q. What was the condition of that ground at that time?

A. At that time that high ground had—was mostly covered with rush and thistles, with a sparse growth of grass, and the rest of the area, as I re-

(Testimony of Bert J. G. Toucey.)

call,—I am a little hazy on this, but, as I recall, it was more a slight growth or some growth of fox-tail, but definitely it was not the grass type of vegetation that is on there now, and there were large open areas, in this northern end, of that black dust that had been blown around there for years. This fence line was very prominent as being blow dirt to the—well, almost as high as the fence, I will say.

Q. Was that in 1937?

A. Yes, sir, that is right.

Q. Which fence was that that was covered with dirt?

A. That was this fence that we went south along yesterday.

Q. Now, when were you again on this tract of land?

A. I was there in the fall of 1938, at the time we had the court there.

Q. And what was the condition of the fence at that time?

A. At that time we were unable to get south of this fence. We started to go across there, but that was a barren mud flat.

Q. Were you able to get any further south than the meander line?

A. At the time that we took the court down there I remember [199] distinctly that we were not able to get any further south. Now, whether we were in my preliminary work I would not be able to say for sure.

(Testimony of Bert J. G. Toucey.)

Q. And since 1938 have you been on there until yesterday?

A. Not until just yesterday, no, sir.

Q. In 1931 do you recall any crops of any kind grown on this particular tract of land, now,—do you recall any crops growing there?

A. Well, the grain was growing in that general area, and, as I say, we mapped that very accurately at that time and since that time that boundary line has been projected on there, so there was undoubtedly that small area of grain within this tract of land.

Q. What was the condition, was it dry or wet, down there in the south part of this tract then?

A. It was dry.

Q. Would you say it was dusty?

A. That is right. The wind—we had some dust storms down there where it was impossible to do survey work.

Q. What year was that?

A. That was in 1931.

Q. Do you recall any fences down there on the east and west boundary of this tract in 1931?

A. On the boundary as now computed there were no fences.

Q. Were there any fences enclosing this area in 1931? [200]

A. Not this particular area.

Mr. Fuller: I believe that is all.

Cross-Examination

By Mr. Hicks:

Q. Well, Mr. Toucey, when you were down there

(Testimony of Bert J. G. Toucey.)

in 1931 you saw fences all over the place, didn't you? A. Sure, there were fences there.

Q. Yes. Now, the lines of this particular tract had not been definitely identified, is that true, to your knowledge? A. That is right.

Q. But the lands were enclosed with good fences throughout, weren't they? A. What lands?

Q. Well, these various lands on the lakebed, including these lands and these others that you have mentioned? A. Yes.

Q. What you mean to say is that there was not a fence along each line here, and so forth, as the tract appears on the map? A. Yes.

Q. That is what you meant, wasn't it?

A. Yes, sir.

Q. But the lands that the Hayeses were using there, and the other folks, were fenced with good fences? A. That is right.

Q. Now, you spoke about dust in 1931. You likewise found dust [201] there in '34, didn't you, Mr. Toucey? A. Surely.

Q. And that was in those dry years, and the lake in the summertime went completely dry, isn't that correct? A. Yes.

Q. And you certainly went on there in 1931, isn't that true? A. Yes.

Q. What did you go on there for, Mr. Toucey?

A. For the purpose of making that topographic map?

Q. And what was the purpose of making this topographic map?

(Testimony of Bert J. G. Toucey.)

Mr. Boylan: If the Court please, I object to that as being improper cross-examination.

Mr. Hicks: I think it is important, your Honor.

The Court: No, the purpose has no value.

Q. (By Mr. Hicks): Mr. Toucey, when you went down there in 1931 you helped prepare this map, didn't you? A. That is correct.

Q. I notice on the map houses and improvements located out there in what is now known as the middle of the lake, in various places; isn't that correct? A. Yes.

Q. And were people living in those places at that time?

Mr. Boylan: If the Court please, I object to that as improper cross-examination.

The Court: Objection sustained. [202]

Q. (By Mr. Hicks): Mr. Toucey, you mentioned some grain fields in your direct examination and you pointed to a general area on the map. I wonder if you would step down to the map and definitely indicate the areas that you found in grain.

A. The grain fields are identified or bounded by this broken line. That is the westerly boundary of this large grain area (indicating).

Q. And on the map you have identified that by noting grain fields written on the map, is that correct? A. On the original map, that is right.

Q. And those embrace the tract that we are concerned with here, don't they, Mr. Toucey?

A. A very small part of that tract is included in that line.

(Testimony of Bert J. G. Toucey.)

Q. And that only purports to show the grain fields that were there in 1931?

A. That is correct.

Q. Now, did you make any investigation of grain fields as they appeared in 1934?

A. No, sir.

Q. Or '33?

A. No, sir.

Mr. Boylan: If the Court please, I object to that as immaterial and not proper cross-examination. If I remember aright, the witness testified that he was there in 1931 and '37.

Mr. Hicks: I asked him if he made any investigation in that [203] year.

The Court: Well, he couldn't if he wasn't there.

Q. (By Mr. Hicks): Well, as I understand, you know only about this grain tract in 1931?

A. That is correct.

Q. And I believe you said you were there in '37?

A. Yes, sir.

Q. You were not there in '34?

A. No, sir.

Q. Did you find any grain grown on that tract in '37, Mr. Toucey?

A. No, sir.

Q. In your years of experience on Malheur Lake you are familiar with the soil qualifications down there where the grain is grown?

A. Yes, sir.

Q. Now, state whether or not this soil here for hundreds of acres is not identical in character and texture with the areas that you found the grain growing on in 1931?

A. Why, that is probably true.

Q. Now you may resume the stand. Now, tell the jury about the kind of crop that you observed growing on that land in 1931.

(Testimony of Bert J. G. Toucey.)

A. They were very good appearing grain crops to me. I mean I was not qualified at that time, or I am not qualified now, to judge as to how good they were. I heard that they got good [204] yields off of them.

Q. You heard what the yield was?

A. I don't know now.

Q. What kind of grains were growing on these fields that you have identified?

A. Well, there were oats and barley. I believe there was some wheat. That is, I can't now say which was grown, and I will say this, that only on the western edge of that grain field did I actually do the mapping work. The stuff further on to the east was done by other parties and I only went through that area once or twice. My detail work was done down to the west and south.

Q. Now, in your experience in your life, Mr. Toucey, I assume you have seen lots of grain that is growing, oats and the types of grain you have mentioned?

A. I have seen quite a few.

Q. I want you to tell the jury whether in your whole life you ever say a finer crop of grain than you saw growing down there in 1931?

A. Oh, yes.

Q. You say you have?

A. Yes, sir.

Q. Where?

A. Down on Tule Lake.

Q. Tule Lake?

A. Yes, sir. [205]

Q. Are you familiar with Tule Lake, Mr. Toucey?

A. I was at Tule Lake in 1932 and did a limited amount of work in that area.

(Testimony of Bert J. G. Toucey.)

Q. And that is lakebed land, too, is it?

A. Yes, sir.

Q. Very rich land? A. Yes, sir.

Mr. Boylan: If the Court please, I object to that as immaterial, not proper cross-examination.

The Court: Objection sustained.

Q. (By Mr. Hicks): What do you say about the qualities of this land, Mr. Toucey, as to fertility, texture, and general soil qualities?

A. Well, I am not a soil expert. It is comparable, but does not have the water control.

Q. Now, the first time you were there was in '31. Were you there during the wintertime of 1931?

A. I only was down in the vicinity of the lake. I was not on this tract in the winter of '31.

Q. You were not; so you would not be able to inform us concerning the feeding conditions there during that winter, would you? I mean you were not there that winter, as I understand, on this tract?

A. I was in Burns, but I was not on this tract of land.

Mr. Hicks: That is all. [206]

Mr. Fuller: That is all.

(Witness excused.)

Mr. Fuller: Call Mr. John Scharf. [207]

JOHN SCHARF

was thereupon produced as a witness in behalf of the plaintiff herein and, having first been duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Fuller:

Q. Mr. Scharf, by whom are you employed?

A. By the Fish and Wildlife Service.

Q. And in what capacity?

A. As superintendent of the Malheur Refuge.

Q. And where do you reside?

A. I reside at what is known as the Sod House, about 34 miles from Burns.

Q. Where is that with reference to Malheur Lake?

A. Well, that is just about a mile south of the south shore of Malheur Lake.

Q. And is that within the area comprising the Malheur National Wildlife Refuge?

A. Yes, it is.

Q. How long have you been superintendent of the Refuge.

A. I have been superintendent since January, 1938.

Q. Were you employed in any other capacity prior to that time? A. Yes.

Q. What was that?

A. Well, I was Assistant Superintendent from August 1, 1935, [208] until January 1, '38.

Q. Was 1935 the first time that you came in contact with Malheur Lake? A. Yes, sir.

(Testimony of John Scharf.)

Q. And you have been in continuous contact with it from 1935 until the present time?

A. That is right.

Q. Are you familiar with this particular tract of land that is the subject of this condemnation suit?

A. Yes, sir.

Q. How long have you known this particular tract of land?

A. Well, if I recall, the first time that I was on this particular tract of land was either in August or September of '35.

Q. Will you describe the conditions as you found them in August or September of 1935, as relating to this particular tract of land?

A. Well, on my first trip there I came through from the east by horseback and rode through just below the house of this particular tract and——

Q. Just a minute. Now, where is that house that you are referring to?

A. Well, that house is on the upland, very close to the Neal survey line, or the meander line.

Q. All right, go ahead, then. [209]

A. I came through that tract from the east and, as I recall, went down along the west fence to where I crossed the fence, and I am not sure that I went through a gate or I just rode over the fence, going toward the Hob Graves windmill.

Q. What was the condition of that land that you saw at that time?

A. The part that I saw was quite dry and wind-blown.

(Testimony of John Scharf.)

Q. Were there any crops growing upon that land that you saw?

A. I don't recall that I saw any agricultural crops on that particular land.

Q. Did you see any grain grown at that time?

A. Well, on that trip, but not on that piece of land.

Q. Since 1935 have you been upon this land at any time?

A. Yes. I couldn't say that I have been on it each season specifically, but I have been in the general vicinity, and perhaps most seasons I have been on a part of it.

Q. Have you ever seen, at any time, grain growing upon this particular tract of land?

A. No, I have not.

Q. Do you know what the water condition has been upon this particular tract of land, I mean as to the level of it, within the past year, how high the water raised?

A. Well, I know, yes, how far it has been on the land. I am not familiar with the contours in that particular section, but I know generally the area that has been wet. [210]

Q. Could you tell me what area on that—could you come down and point out on the map what area has been wet this past year?

A. Well, this area in here (indicating) received some early water, sufficient for a crop, and then the water has receded off slowly this summer as it evaporated, and this low area, I imagine that this line in

(Testimony of John Scharf.)

here (indicating) would perhaps mark pretty closely the area that remained wet quite late, later than is consistent with growing a hay crop.

Q. Did that condition prevail pretty uniformly for the past five or six years?

A. Well, it is dryer this year than it has previously been since about '41 or '42.

Q. '41 or '42 was a wet year?

A. Well, '42 was quite wet and '43 was extreme high water.

Mr. Fuller: '43. You may resume the stand. I believe that is all.

Cross-Examination

By Mr. Hicks:

Q. Mr. Scharf, referring to the water condition, did I understand you to say that you were on this tract earlier this year?

A. Yes, I was there this spring.

Q. And observed the water condition?

A. Well, I was down to the water's edge, yes.

Q. About what time were you there this spring, Mr. Scharf?

A. Oh, I would judge in April or May. [211]

Q. And just there the one time?

A. Well, I was there a number of times, but relatively close together.

Q. Well, now, that was the time of about the high water, wasn't it?

A. Well, it would have been, yes, that is right.

Q. And then tell the jury with what rapidity the water recedes from this land?

(Testimony of John Scharf.)

A. Well, it varies. Some years we have—during what we consider to be a normal runoff, why, our high water in the lake, since I have been familiar with it, has been along in May and June, and usually June is our high-water month for high-water peak; then it recedes, some years quite rapidly, other years more slowly, depending on the amount of flow of the two streams running into it. This year the flow was very short from both streams and the rapidity of the recession was much more rapid than what we think or refer to as being normal.

Q. Now, you mention the Blitzen and the Silvies Rivers. State whether or not the Blitzen comes in on the south and west of the Cole Island dike, is that right?

A. That is right.

Q. And the Silvies River comes in on the north and likewise west of Cole Island dike?

A. That is right.

Q. And state whether or not all the water that comes into the [212] Malheur Lake comes in west of the Cole Island dike?

A. Well, not all, but a substantial part of it does.

Q. Would you say that ninety-five per cent of it does, Mr. Scharf?

Mr. Boylan: If the Court please, I object to that as not proper cross-examination.

The Court: He may answer.

A. Well, of course, it would be just a gross estimate on my part as to what percentage it was.

Q. (By Mr. Hicks): Do you know any other streams that feed Malheur Lake?

(Testimony of John Scharf.)

A. No live stream, no. Some years there is a considerable amount of water comes in from Malheur Slough, which is in the northeast corner of the lake.

Q. Now, I understood you first came there in 1935? A. That is right.

Q. Now, this dike was not up at that time?

Mr. Boylan: If the Court please, I object to that as not proper cross-examination.

Mr. Hicks: Your Honor, he undertook to testify to the water conditions.

The Court: Yes, but I don't know what that has to do with it. I will sustain the objection.

Mr. Hicks: May I make an offer of proof?

The Court: Oh, yes. [213]

Mr. Hicks: Under the usual conditions?

The Court: Yes.

Q. (By Mr. Hicks): Now, as I understand your testimony, Mr. Scharf, you saw this land in 1935, when you rode across there horseback?

A. That is right.

Q. Where did you leave from that day?

A. Well, I left from the Sod House Ranch.

Q. And you rode in which direction across this land?

A. Well, I rode out across the east portion of the lake, around by Cane Island, where it has been referred to as the lake shore, around by the mouth of Silvies River, across up through by the Cupola House and back across by the Dick Hayes windmill, across to the Gardner place.

(Testimony of John Scharf.)

Q. Do you remember for what purpose you made that trip?

A. Well, primarily to get acquainted with conditions and the people and the country.

Q. And you rode through and over dozens and dozens of tracts of land?

A. Well, a considerable number, yes. I wouldn't say exactly the number.

Q. And that was twelve years ago?

A. Yes.

Q. And did you take any notes of your observations that you made at that time? [214]

A. Well, as I recall, the only notes that I took at that time was a cattle count or two that I made on some of these particular areas.

Q. What time of year was that that you made that trip, Mr. Scharf?

A. Well, that was either August or September.

Q. Did you go over it that winter to find out how many cattle were grazing down there? Or did you?

A. No, I can't remember that I did. I was down there a number of times in the winter, but at that time I was in charge of construction work and didn't have too much to do with——

Q. And, of course, at that time you did not know exactly what this tract was, because nobody did?

A. That is right.

Q. Did you find the tract down there fenced?

A. Well, there were old fences all over the lake-bed.

(Testimony of John Scharf.)

Q. Well, are you able to tell the forage and other conditions all over this tract?

A. Well, just in a general way, that is all.

Q. It would be in a very general way, wouldn't it, Mr. Scharf?

A. Well, yes. At that time of year it had been pretty well grazed over and it would be quite dry. About the only forage that was left there that I saw was dry foxtail.

Q. And you mentioned that there was an area down there from which the water had receded, and so forth, and had a very [215] sparse growth down in, I believe it was this tract, wasn't it, Mr. Scharf?

A. Well, yes.

Q. I want to ask you whether or not, the many winters that you have seen there on the lake, those plants, after the water has receded, the plants will grow even through the wintertime down on Malheur Lake?

A. Well, of course, I think that is a matter of opinion.

Q. Well, I am just asking your opinion, from your observation.

A. Yes, it has been my observation that if fox-tail is protected by some growth and gets a start in the fall that it will at least remain green throughout the winter, and if the weather is favorable, will perhaps grow some.

Q. Mr. Scharf, have you ever been on this Hayes tract of land in the winter to ascertain the number of cattle that were wintering on it?

A. No.

(Testimony of John Scharf.)

Q. Have you ever been on this tract of land during periods of time when Malheur Lake is blooming at its best to ascertain the crops that were appearing on that tract of land?

A. Well, I have been on there when it was necessary to walk out there on account of water, if that is what you have reference to.

Q. You know the water recedes down there, don't you?

A. Yes. [216]

Q. I am asking you, have you ever been on the Hayes land after the water has receded and it has been irrigated to ascertain the kind of crops and the quality that were appearing on the land?

A. Yes.

Q. All right, I want you to tell the jury about it.

A. Well, I have been in that general vicinity and on this particular tract a great number of times with regard to fence repair, and general observations, and this tract, when the conditions are right, supports a considerable amount of forage, such as the coarser grasses and salt grass; on the uplands, some of the better grasses, like the bluejoint, where the moisture conditions are proper. On the low lands there's some of the wide-blade sedges, the jonquils or watercress. I have seen a very limited amount of sugar grass, rather dense tule growth or flags or type of burweed.

Q. You have seen some wonderful hay crops on this particular tract of land, too, haven't you?

A. Well, I wouldn't call them wonderful, but they have been very good, yes.

(Testimony of John Scharf.)

Q. The kind of crops that cattle will do well on?

A. Yes, if the cattle get enough of it and get enough to drink they will sustain themselves on it.

Mr. Hicks: That is all.

Mr. Fuller: That is all.

(Witness excused.) [217]

Mr. Boylan: Mr. Woodward.

DOREN E. WOODWARD

was thereupon produced as a witness in behalf of the plaintiff herein and, having first been duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Boylan:

Q. Mr. Woodward, what is your business?

A. I am a land valuation engineer employed by the Fish and Wildlife Service of the United States Department of the Interior.

Q. How long have you been in that employ?

A. I have been following the same work since 1930.

Q. And what are your duties with reference to that employment?

A. At the present time I am supervisor of lands in Region 1, which embraces six Western states. The duties of that position involve the administration of all acquisition work, the appraisal of lands, and contracts, and, in a general way, supervision over surveys and maps.

(Testimony of Doren E. Woodward.)

Q. You have had some experience, then, in appraising real property?

A. A great deal of experience, yes.

Q. And over what period does that extend?

A. Since 1930.

Q. Has that been a continuous experience as an appraiser?

A. Yes. There were two years in the service I didn't do much [218] appraising.

Q. And during that time did you appraise a considerable area of land?

A. Well, I haven't totalled it up, but it would amount to millions of acres and several millions of dollars.

Q. And over what area did you operate?

A. Primarily west of the Rockies. Some of it has been as far east as the Mississippi.

Q. Have you had experience in appraising land in Oregon?

A. Yes, sir.

Q. And particularly with reference to Malheur Lake and Harney County, Oregon?

A. Yes, sir.

Q. What experience have you had in appraisal of land on Malheur Lake?

A. Well, I have personally made appraisals here, mostly since 1941, off and on.

Q. Have you been on the lake at various times since 1941?

A. With the exception of '44 and '45.

Q. That was during the time you were in the service?

A. Yes, sir.

(Testimony of Doren E. Woodward.)

Q. Now, are you familiar with the tract which is known as Tract No. 17 on Malheur Lake, which is the land under condemnation in this action?

A. Yes, sir. [219]

Q. Have you been upon that land at any time for the purpose of making an appraisal of it?

A. Yes, I have.

Q. When?

A. Well, the first time to make a specific appraisal of it was just about a year ago now, and I visited the tract several times this year.

Q. How much of a place is this? How many acres in this tract of land?

A. In all, there is a little over 1101 acres.

Q. Will you describe to the jury, in a general way, what this land consists of?

A. That is most easy to do by dividing it into the uplands and the lakebed lands. The uplands at the north end have a little rabbit brush and grass and some native meadow. Just about the center of the land there is a large greasewood knoll, lying northeast and southwest, that occupies, I would say, about sixty, maybe sixty-five acres. That is fringed with salt grass and blue-joint now, and sometimes mowed for hay. The west forty is ordinarily a mud flat covered with forbs and weeds or rushes, but this year for the first time to my knowledge has a small oat field in it. To the east the land has been utilized as wild hay meadow. Within the lakebed there is one area of 320 acres which is referred to as Special

(Testimony of Doren E. Woodward.)

Master Tract 48, which is primarily grazing and hay lands. There is another area just [220] west of that that is grazing and marsh. That is down to about the 90-foot contour, I believe; and from there south it is water or mud flat, depending on the elevation, and tules.

Q. Well, now, Mr. Woodward, you speak about the upland; what is the dividing line, if any, between the upland and the lakebed?

A. It is the north meander line that is shown on the ground at this time by a good fence.

Q. Are you familiar with and do you know what Special Master's Tract No. 48 is?

A. Yes, sir.

Q. What? A. Yes, sir.

Q. Will you step down to the map, if you please, and point out the lands that you designate as the uplands and also the lands designated as Special Master's Tract No. 48?

A. These are the uplands, here is the meander line, the Special Master Tract 48 following east-bound to the south, southwest, southwest, and north to the point where it joins the meander line again, the area in here (indicating).

Q. That is an area within what is designated as the lakebed?

A. That is entirely within the lakebed.

Q. You may resume the stand. Do you know the number of acres in Special Master's Tract No. 48?

(Testimony of Doren E. Woodward.)

A. It is my recollection there's 320 acres in that tract.

Q. Now, in this case, Mr. Woodward, for your information, as [221] shown by the files in this case, on the 11th day of February, 1947, the Government filed in this court a Declaration of Taking for the full fee simple title to this tract of land which is designated as Tract No. 17, reserving to the owner at that time the right to use in livestock ranching operations, such as harvesting of hay and feeding and grazing of stock, the surveyed land and the Special Master Tract No. 48 in the bed of Malheur Lake, for the period of five years from October 9, 1946, in accordance with the rules and regulations of the Secretary of the Interior. I will ask you whether, from your examination of this tract of land and this Special Master's Tract, the whole thing, and from your experience as an appraiser, you formed an opinion as to the fair market value of this tract of land known as Tract No. 17, with the reservation for the five-year period of the upland, of the surveyed land, and the Special Master Tract No. 48, as I have read it to you from the complaint?

A. Yes, I have.

Q. And, in your opinion, what is the fair market value of that tract of land with that reservation as of February 11, 1947?

A. Ten thousand eight hundred dollars.

Mr. Boylan: Cross-examine.

(Testimony of Doren E. Woodward.)

Cross-Examination

By Mr. Hicks:

Q. Now, Mr. Woodward, you first went with the Fish and Wildlife [222] Service, when was it?

A. Well, in 1930, but at that time it was known as the Biological Survey of the Department of Agriculture.

Q. In 1930 you went with them, but of course the name was later changed to the Fish and Wildlife Service, is that right?

A. That is correct, through various consolidations and reorganizations.

Q. With the exception of the two-year period, you have been engaged rather continuously in behalf of the Fish and Wildlife Service, is that true?

A. For eighteen months or two years prior to my entering the service I did appraisals at the request of and for the Navy Department.

Q. Yes. Now, Mr. Woodward, in connection with your duties, I take it that part of your duties is to appraise lands, is that right?

A. That is correct.

Q. And then your major duty is to try to acquire lands from the people that the Government is taking it from, is that correct?

A. That is the duty of my office, yes.

Q. Yes; and you, too,—you go around to the kitchen doors and talk to the folks, don't you, Mr. Woodward?

A. That is true.

Q. And you appraise these lands for a very special and particular purpose, don't you, all of them? [223]

A. No.

(Testimony of Doren E. Woodward.)

Q. Well, now in appraising lands, Mr. Woodward, I want to ask you whether it is not important in making your appraisals to know the history of the land and to know what it has produced and what its utility has been?

A. That is true, in as far as it can be determined.

Q. Yes. Now, did you, in connection with the appraisal you made on this tract, ascertain before you made that appraisal and before you came to this courthouse today what that land has been used for for the last forty years, right up to the present time?

A. Yes. I did not make specific inquiry, but I have talked to the Hayeses and to others who are familiar with that part of the land. I don't know that it was forty years back.

Q. Well, did you find out the number of cattle that were wintered on this tract winter after winter?

A. I was told numbers of cattle that wintered on the lakebed, but I am not convinced that they were on this tract.

Q. And you learned about the grain crops that were grown down there, did you?

A. I have no information, except for the grain that is there this year, of grain being grown, other than that small surveyed area in 1931. Now, the lakebed tract was not demarcated until the adjudication of 1944, and so prior to that time it was diffi-

(Testimony of Doren E. Woodward.)

cult to say whether a grain crop was on a given parcel or [224] not.

Q. Well, of course, you knew the area, you have known since 1931 the area, that this tract was on? A. In a general way.

Q. Now, in making your inquiry concerning the production history of this tract of land did you go to Bell Hayes and Marcellus B. Hayes to find out what had been done on the tract through all the years? A. They told me that, yes.

Q. They told you the kind and the volume and quantity of crops that they got down there on that tract year after year, didn't they?

A. That is true, but, as I have told you previously, I was not convinced that it was on this tract.

Q. Oh, they pointed out the areas and places then and there right immediately south of the tract, didn't they?

A. Special Master Tract 48, but this tract goes much farther south than that.

Q. Well, didn't you discuss this tract on further south with them, too, Mr. Woodward?

A. Oh, yes.

Q. And they told you the production that developed there through all the years?

A. They spoke of grain fields, but, as I said, my only specific knowledge was that surveyed field and no one knew the boundaries [225] until 1944, so I think you will excuse me if I am skeptical as to their allegations of what took place when they didn't know the boundaries until 1944.

(Testimony of Doren E. Woodward.)

Q. But they were living right about there, Mr. Woodward, from year to year, been on there for forty years. Don't you think they knew what these areas were after they were finally delineated?

A. I am doubtful.

Q. Well, anyway, you would not accept that history of the crops that were grown on the place?

A. Not verbatim, no.

Q. Now, answer me this: How many times in your whole life have you ever been on this tract?

A. Well, I hesitate to set an exact number, but I would say six or eight.

Q. And do you suppose in your whole life you spent as much as an entire day, with all of that time lumped together, on this 1101 acres?

A. Oh, yes, more than that.

Q. A day and a half?

A. I would guess two or three days in all.

Q. Ever been down there in the wintertime, when the cattle were wintering on these and adjoining lands?

A. Well, I came down there once in the early spring, but couldn't get to the land at all. [226]

Q. I am asking you about the wintertime.

A. Well, that is the only time I have been down there.

Q. In connection with your investigation of grain crops on this land, did you find out the yield?

A. I was told by, I think, Mrs. Hayes, one of the Hayeses, what the yields of the grains in the lakebed were.

(Testimony of Doren E. Woodward.)

Q. Yes; and you know that as a matter of general history about the yields, don't you, Mr. Woodward?

A. In the lakebed at large.

Q. Well, is there any difference between the lakebed at large and this land that we are talking about here, and the big grain yield?

A. The big grain yield is in a lower elevation than this land.

Q. How far?

A. About a foot.

Q. Land of the same texture as the other land that we are talking about?

A. As far as I can see.

Q. I wonder, Mr. Woodward, if you would step down to the map and, with the Court's permission, outline on the map this so-called Master Tract No. 48? Maybe a pen is better.

The Court: Here is a red pencil.

(The witness here placed some marks upon the map.)

Q. (By Mr. Hicks): Now, all right, you may take the stand, I believe that tract comprises 320 acres? [227]

A. That is my recollection, yes.

Q. I believe you noted it as hay and grazing land?

A. That is true, for the most part.

Q. Meadow land, is that what you call it?

A. Low-grade meadow.

Q. Low-grade meadow?

A. Yes.

Q. Now, how many acres of hay land is there within that Master tract?

(Testimony of Doren E. Woodward.)

A. Well, I will tell you in a minute. There would be about—well, I didn't break it in two. I classified it as grazing and hay, 280 acres.

Q. Now, you appraised that with a view to ascertaining a reasonable rental value, did you, for a five-year period? Is that what you were doing?

A. That was necessary, yes.

Q. And did you check that particular tract, Mr. Woodward, to ascertain how many tons of hay per acre were grown on that tract through the years?

A. Oh, yes, then I tried to apply my knowledge of the lakebed to it also. The volume may vary every year, almost, because of the fluctuation of the water level.

Q. Yes, but there is what we call a norm. From year to year,—was up until 1935, wasn't there, to your knowledge?

A. That is before my time. [228]

Q. Yes. Did you find any part of this Master tract at all, Mr. Woodward, that would not grow good crops of hay?

A. Yes.

Q. What part?

A. There is a little pothole or sump near the northwest corner that is too low. It is usually in mudflat or tules.

Q. And that is the area that would not grow hay, to your knowledge?

A. That is the area that I do not believe would ordinarily grow hay.

Q. With the exception of the little tract of about forty acres that you mentioned?

A. Yes.

(Testimony of Doren E. Woodward.)

Q. And you described that as meadow hay land, excepting the part that you accepted?

A. Yes.

Q. Now, for the purpose of your over-all appraisal, I assume you arrived at a figure as to the value of that hay land as of February 11, 1947, didn't you? A. Yes, sir.

Q. What value did you put on it, Mr. Woodward?

A. Well, on that in Special Master Tract 48?

Q. Yes, just that?

A. That would be \$4200.

Q. I mean how much per acre? [229]

A. Fifteen dollars.

Q. Fifteen dollars an acre for meadow hay land, is that right?

A. That quality of meadow hay land, yes.

Q. Now, I take it you have never yourself examined the haystacks and the hay that has come off of that that you call the Master tract, the 320-acre tract?

A. Well, yes, I have, the last two weeks or so, observed particularly the area that is mowed and rake-bunched down there, more than I had ever seen before.

Q. Yes, but I mean haystacks. You have never seen any haystacks on there?

A. I haven't seen a stack on the place that I can recall.

Q. And tell the jury about the kind and quality of hay that you saw down there this year, Mr. Woodward.

(Testimony of Doren E. Woodward.)

A. Well, this year the meadow type north of the greasewood knoll is much poorer than it was last year. Near the house, on the south end of the greasewood knoll, there is some good bluejoint that was not mowed,—I don't know why—but in the area along the meander line there is some average hay meadow, and a little to the south. In the northeast corner there is a little what I think was intended to be a grain field, but it didn't get much higher than foxtail, and, for the most part, in the south end of the lakebed it is tules and cattails and wire grass.

Q. I was asking you about the Master tract.

A. Excuse me.

Q. When you mentioned that there was some little peat hole there, that was not in meadow or hay land, how many acres in that?

A. About forty.

Q. That would make about 280 acres, would it, of these meadow hay lands?

A. In Special Master Tract 48, yes.

Q. Now, I am going to ask you how many acres of hay land, of the meadow land, outside of Special Master Tract 48?

A. The area immediately west of the Special Master Tract 48 is distinctly comparable, and I put the same valuation on that.

Q. You put a \$15 valuation on that hay ground, too, did you?

A. On that type of vegetation.

(Testimony of Doren E. Woodward.)

Q. All right. Now, what value did you put on that part up above that has the greasewood on it, the sagebrush, that 80-acre piece, or whatever it is?

A. Now you want the entire upland piece?

Q. Yes.

A. You have mentioned several things there, Mr. Hicks. Do you want the whole upland?

Q. If that will be more convenient.

A. Well, I classed as \$2 land rabbit brush and greasewood, 84 acres; and——

Q. Just a minute. [231]

A. That is \$168.

Q. One hundred sixty-eight dollars for 84 acres of greasewood grazing land, is that right?

A. Well, of the greasewood only has virtually nothing on it.

Q. Doesn't it have salt grass on it?

A. Just on the edges.

Q. Two dollars an acre. All right.

A. And I classed as meadow sixty-two and a fraction acres, 62.68, at \$20.

Q. That is the meadow hay land?

A. On the upland.

Q. Yes.

A. Twelve hundred fifty-three dollars and sixty cents. And then 27 acres has weeds and forbs,—it is on the west forty—at \$10 an acre, \$270.

Q. Let me interrupt you there. That 27 acres, that has a high quality forage on it, doesn't it, Mr. Woodward?

(Testimony of Doren E. Woodward.)

A. Well, this year it is, part of it, in oats.

Q. Oh, you put the grain land in that has the grain growing on it at \$10 an acre?

A. That is right.

Q. Mr. Woodward, do you know something about the grain situation? I mean grain land and grain production, and that sort of thing?

A. Well, I suppose it is safe to say I know something. It is a very loose question. [232]

Q. You saw the crop growing on this tract of land, didn't you, down there? A. Yes.

Q. And there's about thirty or thirty-five acres of it? A. How much?

Q. Thirty or thirty-five acres of it?

A. No, I don't believe so.

Q. How much would you say?

A. About sixteen.

Q. And you saw a stand of oats on it?

A. Yes, sir.

Q. And what quality stand was it?

A. It appeared to be very good.

Q. Very good, a very good stand of oats. From your experience in the oats business, or in the grain business, from your knowledge as an appraiser, could you tell us what could reasonably be expected from just one year's production on one of those acres which you appraised at \$10?

A. Maybe——

Mr. Boylan: If the Court please, I object to that as improper cross-examination.

The Court: Objection sustained.

(Testimony of Doren E. Woodward.)

Q. (By Mr. Hicks): I believe you said, Mr. Woodward, volunteered, that you had never seen oats or grain growing on that tract before; is that correct? [233]

A. That is correct.

Q. Have you ever been right at that place before, to ascertain whether grain had been grown on that before?

A. I was right on that exact place wading through mud last year.

Q. No grain on that last year?

A. Oh, no.

Q. That was a mudflat last year, wasn't it?

A. It had a growth of weeds and forbs coming on it which would furnish succulent feed.

Q. But that was mudflat last year?

A. Yes, sir.

Q. And this year you saw the grain growing on it?

A. For the first time in history.

Q. The first time you had seen it?

A. Yes.

Q. Now, speaking about history, were you down there in '31 and saw the grain growing there on what you call mudflats?

A. No, sir.

Q. Were you on there in '34?

A. No, sir.

Q. In '35?

A. I was on there in 1935, yes.

Q. You saw some of this same character of ground that was growing grain? [234]

A. Yes, there were large areas of mudflats that were——

Q. Now, referring to this area that Mr. Toucey told us about——

(Testimony of Doren E. Woodward.)

A. If I may, please, approach the map? The light is now so poor that I can't see what he is pointing to.

Q. Yes, that is all right. What valuation did you put on this land down below here (indicating)?

A. Seven dollars an acre.

Q. Now, in your experience, Mr. Woodward, in appraising lands for the Fish and Wildlife Service and the Biological Survey, I want to ask you if you ever have seen any richer or finer land in your whole experience than you find in that land that you appraised at \$7 an acre? A. Yes.

Q. Where?

A. Well, many places. In Iowa, for instance.

Q. Was it lakebed land?

A. You didn't ask me that.

Q. I am asking you if it was lakebed land?

A. No.

Q. Well, you say it was better land than this?

A. Yes, sir.

Q. Very much better? A. Yes, sir.

Q. Now, you have been more familiar with this tract in the last five or six years, have you? [235]

A. I have become most familiar with it since my return in 1946.

Q. Well, now, in the whole experience you have had with Malheur Lake since 1931, I believe you said,—or was it '35? A. '35.

Q. —has there ever been a time that you have been down on this tract, we will say, first, in the

(Testimony of Doren E. Woodward.)

wintertime, to observe the number of cattle that were being served in this area on this tract?

A. No.

Q. In your whole experience have you ever been down there on Malheur Lake when these tracts have been blooming that were growing, and so forth, and ascertained the growth of grasses and hay and forage, and so forth, that were on this tract?

A. I have been down there at different seasons of the year, but not during the winter, with that one exception. For appraisal purposes it is too difficult to accomplish in the wintertime.

Mr. Hicks: That is all.

Mr. Boylan: That is all.

(Witness excused.)

Mr. Boylan: Mr. Dryer, take the stand.

Mr. Hicks: Your Honor, I forgot to ask Mr. Woodward one question. Maybe I could do it another time. Maybe he won't have to take the stand.

The Court: No, you can't ask him a question unless he takes the stand. [236]

DOREN E. WOODWARD

thereupon resumed the witness stand as a witness in behalf of the plaintiff herein and was examined and testified further as follows:

Cross-Examination

(Resumed)

By Mr. Hicks:

Q. I wanted to get the reasonable rental value

(Testimony of Doren E. Woodward.)

that you put on this Master Tract No. 48 for the five-year period, which I believe you state you did appraise.

A. I did not appraise the Special Master Tract separately, because the reservation includes all the surveyed land and the Special Master No. 48, so I made a deduction for that.

Q. Would you give us that figure, please?

A. I took off \$932.

Q. Nine hundred thirty-two dollars is what you took off for that; and that represents the reasonable rental value on all of the deeded land and the Master Tract No. 48, is that right, for a five-year period from February 11th to——

A. Another four and a half years.

Q. Yes, for the full five-year period.

A. No, for the 4½-year period.

Q. Oh, for the 4½-year period; and that would embrace the 320 acres of land as you have described it, 280 acres of hay land, and the interest, and then all of the deeded land, including the hay land and all on the deeded lands?

A. That is correct.

Q. Nine hundred thirty-two dollars for the period of four and [237] one-half years, is that correct?

A. That is correct.

Mr. Hicks: That is all.

(Witness excused.) [238]

HORACE A. DRYER

was thereupon produced as a witness in behalf of the plaintiff herein and, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Boylan:

Q. Mr. Dryer, what is your business?

A. I am a real estate man, have an office in Portland, and I do general appraisal work.

Q. Where is your office in Portland?

A. In the Corbett Building.

Q. How long have you had your offices in the Corbett Building?

A. I have been in the Corbett Building since—it will be three years last January.

Q. Now, how long have you been in the real estate and appraisal business?

A. I have been in business in Portland since 1908.

Q. And tell the jury the extent of your experience as an appraiser.

A. Well, for the last fifteen or twenty years I have spent probably a third to one-half of my time in making appraisals of all types and characters of real estate properties. Those have included a number of buildings in Portland, apartment houses, and rather what we type commercial or business properties. Then I have done a great deal of work and specialized in farm land and have sold and operated my own land, sold a lot of land [239] for other people on a commission basis, and at present

(Testimony of Horace A. Dryer.)

I loan money in Oregon for a life insurance company and make those appraisals. Then I make appraisals for banks and other mortgage companies and private individuals.

Q. And I believe you stated you have been in that work as an appraiser for some fifteen or twenty years? A. That is right.

Q. Now, have you ever appraised any lands in Harney County? A. Yes, I have.

Q. And do you know where Malheur Lake is?

A. Yes, I am familiar with it.

Q. Have you made any appraisals of lands in the vicinity of Malheur Lake other than the appraisals on Malheur Lake itself?

A. Yes, I have. Within the last couple of months I have made appraisals of approximately—well, it is between sixty and seventy thousand acres of somewhat similar lands, particularly similar to what we call the high lands or the hay land and the sagebrush and greasewood, and such land.

Q. Now, are you familiar with that tract of Malheur Lake in the Malheur National Wildlife Refuge known as Tract No. 17? A. Yes, I am.

Q. Have you ever gone upon that tract for the purpose of making an appraisal of it?

A. Yes, I was.

Q. Now, will you tell the jury what you observed with reference [240] to the general characteristics of that tract of land.

A. Well, the upper portion of the land, as you drive into it by going through other lands you

(Testimony of Horace A. Dryer.)

come to a gate and through that is a rather small area, some—I have a map of it—some 75 acres of high land, that I class as just grazing land. It is principally covered with greasewood, and around the outer edges where the greasewood has died out there's indications that it shows some fair stand of salt grass pasture, and as you travel south, get down around the main buildings, to the left of the buildings and somewhat north is quite a sized area of land that has been mowed for hay this year, and on farther down you will find quite a large area of tules,—the ground is dry; there is no water there—but beyond that you go into another area that shows a little higher elevation than this area I just spoke of; it shows ribbons of areas that have been cut, apparently, following the better hay land areas that were cut for hay. Around on other spots there's considerable shorter grasses and considerable salt grass down in that grazing area; and from beyond that point on south for approximately two miles, from my observation, and getting as far south as I could to the mudflats or the tule area that is not so that you can go down on that land, I observed what I could see with a good pair of glasses, the rest of that land; and the first time that I visited this land I went out on the east line of this tract that I speak of that is near the lakebed and went on as far south and east as I [241] could get with a car. And then along the western boundary of this tract of land, as you come in and would be south of the greasewood area, is approximately a 40-acre tract,

(Testimony of Horace A. Dryer.)

about 15 acres, as near as I could determine the amount of land, that was cropped this year, was in oats, a considerable amount of foxtail around the edges of that, but over in the center of the oat field the crop looked fairly good. And lying directly south of the oat field is a sort of a water or wire grass—well, grass approximately six inches to a foot tall, that is dried up somewhat now.

Q. Now, Mr. Dryer, when was it that you made this inspection of this land?

A. I was on the land first about two weeks ago; then I was there again this week.

Q. And how much time did you spend on the land?

A. I was out there two weeks ago on two different days, and I was there—I was on the land two different days about two weeks ago, and I was there, I was on the land again this week.

Q. Well, did you spend some considerable time on the land, or did you just go on it and off again?

A. I spent a good deal of time on the land. I dug, made some soil borings of the high land and also of the lakebed area, and made what I thought was a thorough examination of the property.

Q. Did you find any greasewood on the property?

A. Yes, I did.

Q. Where was this?

A. Well, it was in the northwest corner of the tract as you go in the gate.

Q. And how much greasewood land did you find?

A. As I recall, around 75 acres.

(Testimony of Horace A. Dryer.)

Q. Do you know the significance of greasewood as to quality of the soil?

A. Yes, I do. A correction: There was 85 acres.

Q. What does the presence of greasewood indicate?

A. Well, greasewood areas all through, including this, indicate a heavy alkali in the soil.

Q. Did you see any evidence of alkali on this place other than just the presence of greasewood?

A. Yes, I found alkali generally all over this land.

Q. Now, are you familiar with Special Master's Tract No. 48? A. Yes, I am.

Q. Do you know where that is and the size of it?

A. Yes, it is approximately 320 acres that lies to the south and east of the house, that is where the old cabin is located.

Q. In this case, Mr. Dryer, as shown by the records in the case, the United States took the fee simple title to this land, or this tract known as Tract No. 17, on the 11th day of February, 1947, reserving, however, to the owners at that time the right to use in livestock ranching operations, such as harvesting of [243] hay and feeding stock, the surveyed lands and the Special Master Tract No. 48 in the bed of Malheur Lake for the period of five years from October 9, 1946, in accordance with the rules and regulations of the Secretary of the Interior. I will ask you whether you formed an opinion as to the fair market value on February 11, 1947, of this tract No. 17, the tract under condemnation here,

(Testimony of Horace A. Dryer.)

with the reservation of this five-year user in the prior owners? A. Yes, I did.

Q. What, in your opinion, is the fair market value as of that date?

A. Nine thousand nine hundred twenty-two dollars.

Mr. Boylan: Cross-examine.

Cross-Examination

By Mr. Hicks:

Q. Mr. Dryer, in addition to having experience as an appraiser, I understand that you loan money, is that right? A. That is right.

Q. And you sell insurance, too, don't you?

A. Yes, sir.

Q. How long have you been selling insurance?

A. Practically ever since I opened an office in Portland.

Q. Yes. Now, Mr. Dryer, you say that about a third or half of your time is put in in appraisal work. Isn't it a fact [244] that for about the last two or three months you have been appraising for the Fish and Wildlife Service, devoting most of your time?

A. No, I have been here in connection with several of these cases and was requested to make an appraisal of a number of these properties, which I did.

Q. Yes, you have been here in connection with all the cases, haven't you, Mr. Dryer? A. No.

Q. All the cases that have been tried?

A. No.

(Testimony of Horace A. Dryer.)

Q. Now, I am not going through this full routine with you, Mr. Dryer, but I want to ask you what valuation you put on the meadow hay lands that Mr. Woodward told us about, on which he put a valuation of \$15? I want to ask you what value you put on those? A. On the hay land area?

Q. In the Master tract, the 280 acres of meadow hay land?

A. I did not separate the Master's tract. I noticed that it was drawn out and indicated as a Master's tract on this map.

Q. Well, just tell us the value that you put on the meadow hay land, the irrigated meadow hay land.

A. I didn't find any irrigated meadow hay land.

Q. You did not?

A. No; I found 162 acres of hay meadow that I put in as \$25 an [245] acre, and that was my segregation of hay land from the tule land.

Q. Now, you first saw it this fall, as I understand it? A. This particular tract, yes, sir.

Q. You were on it those two times, off and on?

A. That is right.

Q. And spent those number of hours on the tract, I understand, which is plenty, I assume?

A. That is right.

Q. But did you, Mr. Dryer, talk to those people who had used the land for forty years to find out what it had produced in grain and the cattle that had wintered on it, year in and year out, for forty years? Did you inquire of those folks and inform

(Testimony of Horace A. Dryer.)

yourself concerning this land before you made this appraisal?

A. No; I have found that in matters of this kind oftentimes the information I get from the owners of tracts of land who are involved, that there's many informed people in the neighborhood who can supply me with full information on the facts and conditions, that, with my knowledge and years of experience, I determined what I thought this property was worth.

Q. Well, then, someone did inform you concerning this tract and what it has done throughout all the years?

A. This type and character of land generally, as to the yields, I did not find this extraordinary or any poorer than a lot of the other lands. In general, there's many acres very similar and alike to this land. [246]

Q. Well, then, you did not have any information concerning this tract to know what it has done through all these years for those people, is that true?

A. I observed this land, I observed the condition of the meadows. The land had not been plowed up. It is in its native state. I understand and have studied for some time prior to this appraisal the conditions of the Silvies and Blitzen Rivers, the runoff in the spring, the condition of the water, and all other conditions that, in my opinion, affect the fair market value of this property.

Q. Now, Mr. Dryer, you found some greasewood up on the deeded land, is that right?

(Testimony of Horace A. Dryer.)

A. That is right.

Q. And did you find any greasewood down below the meander line?

A. I found a spot or two that had died out.

Q. Now, tell the jury the dimensions of the spot of greasewood that you found below the meander line.

A. The dimensions?

Q. Yes. Was it an acre, or two acres?

A. Oh, I didn't measure that. I noticed a number of spots that it was very evident there that spots of greasewood had grown up there and then the high water had come in and no doubt had drowned it out; it was dead and still standing, and some of it still standing, in spots on the place. I found some [247] little spots of little dead greasewood, and where there were any signs of that there was also the signs of salt grass growing there.

Q. And was there as much as an acre of that altogether on the lakebed land?

A. I don't recall that there was any amount.

Q. Well, it wouldn't amount to a whole acre altogether, would it, Mr. Dryer?

A. Well, I didn't measure it.

Q. Now, there are in the lakebed, according to this map, 928 acres of lakebed land; is that right?

A. Well, I believe not. This particular piece of land where the small, little patch of oats is growing and that land in the elevation could be classed as lakebed land.

Q. Well, you know everything below the meander line is lakebed land?

A. Yes.

(Testimony of Horace A. Dryer.)

Q. That is 928 acres? A. That is right.

Q. And out of that 928 acres you found only about one acre that had some salt grass and greasewood?

A. That is right. Greasewood does not grow on the lakebed land.

Q. I understand this land had evidences of alkali all over? A. Yes. [248]

Q. The lakebed land? A. Yes.

Q. All right, now, you tell us what parts of that lakebed land show evidences of alkali, as to the spots that you mentioned?

A. I took some samples, dug down on the upland, on the upper bench land, and also on what we call the lakebed areas. I therefore made these soil tests and put this land out where it would aerate enough so we could see what it was like when it was dry. Those soil samples indicated a very, very heavy alkali, much more heavy on top than it was in the lakebed. In other areas there was a type of peat land that develops where there is a heavy tule growth that year after year breaks down and destroys and rots away. In there, in those peat areas, little round sort of peat holes, there is no alkali to speak of. In other words, it is indicative that you could probably grow successfully a lot of different kinds of crops, but the greater portion of this whole tract of land is a very heavy indication of alkali.

Q. Now you are talking about that land below the meander line, is that right?

A. I am talking about all the land that I was

(Testimony of Horace A. Dryer.)

able to get on. There is land in the mudflats and in the tules below that I was not able to get on.

Q. Now, when you say an indication of alkali, do you mean that that disparages the quality of this land? [249]

A. Most certainly it does.

Q. It does? A. Yes, sir.

Q. Maybe you could tell us something about the quality of this land and its fertility and its capacity to produce crops of all kinds.

A. Not of all kinds.

Q. Now, Mr. Dryer, just forgetting about the ebb and flow of the water for a time, I want you to tell this jury any crops that this land won't grow.

A. Well, I haven't carried out an experimental operation on this farm, but my knowledge of land would tell me that there are many crops that you can't grow on this land.

Q. Now, is this the same character of soil that you find over by the place where John Scharf has his home there?

A. They could find a small piece of land down there and wash it out with water and do, probably, what Mr. Scharf has done.

Q. Now, it is the same land, it is the same lakebed land, is it not? A. It certainly is not.

Q. Did you take samples of Mr. Scharf's land?

A. No, but I examined Mr. Scharf's garden spot, so I am familiar with what it is like.

Q. Are you able to tell this jury that there is one whit or one single grain more alkali in this lakebed land than there is [250] in John Scharf's garden?

(Testimony of Horace A. Dryer.)

A Yes, sir.

Q. What do you say about it?

A. There is much more alkali. As a matter of fact, if there is anything in the information that I am able to obtain through Dr. Powers' office in Corvallis, when you find soils that carry more than seven or eight per cent alkali there are certain crops that will not do well and will not grow well in that land, and this land indicates to me—I didn't have time to test this soil—it is much heavier—part of this land—I am not trying to tell you all this land has that heavy alkali, but the majority of it does, except in the peat bed area.

Q. Then you are saying that this lakebed land—by the way, it is the same quality—the lakebed land has a common denominator and quality, doesn't it, throughout the area?

A. Well, you can define lakebed lands, you can find perfectly good soil, but if you don't find the components of climate and conditions and everything else that go with that land it is not successful as a farm project.

Q. But I am just talking about this land and its soil qualifications now.

A. I know you are.

Q. I am going to ask you whether or not, from your knowledge of this tract and other tracts on the lake, this land has not produced profusely grasses and grains and forage crops of all kinds, heavy, rank growth?

A. Yet I looked at some land down there through this dry area, the grass was about four or five inches

(Testimony of Horace A. Dryer.)

tall; it indicated that this year it failed to get water.

Mr. Hicks: Your Honor, may I have the answer stricken and have the question reread to him? It is not responsive.

The Court: No, no, it is cross-examination. You got the wrong answer and you must abide by it.

Mr. Hicks: Well, I want to ask the question again.

The Court: Well, ask him any question you want to, but when you ask him a question and he answers you, that settles it.

Q. (By Mr. Hicks): Now, Mr. Dryer, I am going to ask you whether or not, in the investigation you have made of Malheur Lake in the last couple of months, you haven't found it to be a fact that the lands of Malheur Lake, these lakebed lands that you classify as alkali, and so forth, if in their whole history, except during the limited period of a dry spell, they haven't grown grasses, grains, forage crops, sugar grass, and all that sort of things, in profuse and rank, heavy growth?

Mr. Boylan: If the Court please, I object to that as not proper cross-examination, not confined to the tract under condemnation.

The Court: Objection sustained.

Q. (By Mr. Hicks): Will you tell us whether there is one grain [252] or two grains of alkali in the soil in this tract, Mr. Dryer?

A. There's bucketsful of it.

Q. No, I mean on the grain bases that a chemist analyzes the soil.

(Testimony of Horace A. Dryer.)

A. I am not a soil analyst. I don't profess to be.

Q. Well, you don't know the quantity?

A. I know it when I see it.

Q. Now, you did find that same condition to prevail on the tract of oats that you saw growing down there?

A. I saw some alkali in some of those oat fields down there, yes, sir.

Q. Well, you only saw one oat field down there, didn't you, this year? A. Yes, sir.

Q. And that is the same alkali soil you have been telling us about?

A. There is some alkali, pretty heavy.

Q. You saw the oats growing down there?

A. Yes, sir.

Q. And it was pretty good oats?

A. In the center of the field it was very good.

Q. That alkali didn't bother the oats, did it?

A. No, but from the standpoint of farm land you don't take one crop in ten or fifteen years.

Q. And do you remember it as part of your history that even in [253] this lower area here it had grown grain, and heavy crops of grain?

A. I heard some testimony about it. I didn't see it.

Q. Well, coming back again to the soil question, do you say that the alkali condition is such in respect to this land that it won't grow heavy crops of grain because the soil quality isn't there?

A. Would you like to have me explain that?

Q. I want you to answer the question.

(Testimony of Horace A. Dryer.)

A. I say no. Now, if you will let me explain the answer to the question I shall.

Q. Well, go ahead and give your explanation.

A. From all the records I could find and from my observation of this land over many, many years, the river down there, the Silvies, has washed an alkali condition into this lakebed area, and as there isn't any particular outlet to this land after the elevation gets to about '91, for years and years, and years the alkali waters have settled in that basin and have dried, so that the aeration of the water has left the alkali and it is quite definite and prominent on top, and as you dig down through this soil you will find those layers. As years have gone by and you have a dry cycle, or a wet year and a dry year, you will find an erosion of land that has come down in the river, and if you will cut down through there with a shovel and dig it down you can even lay it out on the ground for just ten or [254] fifteen minutes in the sun and see little white layers of alkali in this land, indicating very heavy alkali.

Q. Well, will land of that character produce grain to the extent of seventy-five to a hundred bushels of oats to the acre?

A. It might now and then.

Q. Well, why will it do it one year and not another, with reference to the alkali?

A. For the simple reason that if you bring this water down, unless you have enough water to sluice this land out and break it down—in many of the areas where they have lots of water they can remove

(Testimony of Horace A. Dryer.)

the alkali from the land and continue to grow crops on it.

Q. Well, is this land and the alkali content such that it won't grow this rank growth of grasses and forage for livestock? A. It grows rank tules.

Q. I am talking about the grasses and feed for livestock.

A. I don't call tules good livestock feed.

Q. Mr. Dryer, do you know what the Taylor Grazing Act is and what it means to a stock rancher?

A. Yes, sir.

Q. Did you take that into consideration here?

A. Yes, I did.

Q. Now, one other question: What value did you put on the grain land where you saw the grain crop growing down there?

A. I put \$15 an acre on the full forty acres. [255]

Q. You found forty acres of that grain land, did you?

A. I just called that forty acres. Now, there's where your fifteen acres of oats come in. You were lucky enough to be able to plant them on that fifteen acres, but not on the rest of the forty.

Q. Did you measure that acreage to find out the acreage of those oats?

A. Well, I have seen enough land that I can tell fairly close, and there's about fifteen acres of oats in that field.

Mr. Hicks: No further questions.

Mr. Boylan: That is all.

Mr. Hicks: Oh, one further question: You found

(Testimony of Horace A. Dryer.)

some 160 acres of hay land that you put \$25 an acre on, is that right?

A. I took what I considered to be the best hay land on the place, which, in my segregation of the figures, took out the tule land that is involved in the hay field, and in my estimation there were 162 acres of hay land that I put a value of \$25 an acre on.

Q. That is the land that goes from one and a half to two tons to the acre?

A. I don't know that it would go two tons to the acre. Your average yield is near a ton to a ton and a quarter of good hay.

Q. Then what valuation did you put on the other hay land that was not quite as good as that, you said.

A. I included the tules in the balance of the land. I put [256] \$7 an acre on the tule land.

Q. And \$15 an acre on the land that was growing the grain? A. This year.

Mr. Hicks: That is all.

Mr. Boylan: That is all.

(Witness excused.)

Mr. Boylan: The Government rests.

(Plaintiff rests.)

Mr. Hicks: We rest, your Honor.

(Defendants Hayes rest.)

The Court: Ladies and gentlemen, it is my intention to submit this case to you tonight. It is now 5:15. I will consult your convenience as to whether

you want to have the arguments now and then go to dinner, or if you want to wait until after dinner and come back here at 7:00 o'clock and have the arguments and the instructions and then I will submit it to you. Now, I will give you just a moment to talk it over among yourselves.

(Short discussion off the record.)

The Court: All right, ladies and gentlemen, I will now excuse you until 7:00 o'clock this evening, and in the meantime do not speak of it among yourselves nor discuss it among yourselves or with other persons or remain in the presence of other persons who may be discussing it. You are now excused until 7:00 o'clock. [257]

(The jury was thereupon excused from the presence and hearing of the Court, and thereafter, in the absence of the jury, proceedings were had as follows:)

Mr. Hicks: Could I make my offers of proof, your Honor, before the jury returns?

The Court: Yes, you can if you want to.

Mr. Hicks: Should it be deferred until later?

The Court: As far as I am concerned, it could be deferred until after the jury goes out, and do whatever you want then.

Mr. Hicks: Very well, we will defer it.

The Court: Court is now in recess until 7:00 o'clock.

(Whereupon, at 5:20 o'clock p.m., September 25, 1947, a recess was had until 7:00 o'clock p.m.)

Evening Session—7:00 P.M.

(Oral argument was then addressed to the jury by counsel for the respective parties, and thereafter the Court instructed the jury as follows:) [258]

INSTRUCTIONS TO THE JURY

The Court: Now, ladies and gentlemen, we have arrived at the final stage of this condemnation action filed against the land occupied by Marcellus B. Hayes and his wife in the action entitled *United States versus Marcellus B. Hayes, et al.* The witnesses have appeared before you and have given testimony and counsel have made arguments as to the value of this land and the interest that the Government is taking therein. The law reposes in the Judge of a Federal Court the necessity of summing up the rules of law which are to be applied in the determination of the facts of a case, and it is now my pleasure to give you such rules of law, as well, in this case, as certain comments of fact.

There are a good many things that come into the trial of a lawsuit which are not evidence, and it is upon the evidence as guided by the rules of law that you must base your determination.

In the first place, counsel have made arguments to the Court and to you. This is a privilege and duty of counsel, in representing a client, to make proper presentation of the facts and the law, and counsel on each side in this case have availed themselves of that privilege. In appraising the influence which the argument should have on you you must remember

that counsel are advocates, they are each employed to represent a client, one side the United States and the other side the land [259] owners, so, therefore, what they say is not evidence for your consideration. It is simply a partisan statement of their sides of the case. You are the sole and exclusive judges of the facts of the case and it is your duty to remember what you saw of this land and remember the evidence and appraise the land upon that basis, and the suggestions of counsel on either side need not be followed by you in arriving at the answer in this case. You may, of course, if you wish, in as far as the arguments are proper, give such weight to them as you choose.

Now, in the next place, there is the view. The view itself is not evidence, but it is given to you for the purpose of allowing you to see the conditions which are described, so that you will understand them, and, while you have a right to use a view to throw light on the testimony, it in itself is not evidence.

Now, this is an action for condemnation of lands brought by the United States against the defendants. The defendants, in this instance, own the property in fee simple, and the United States, under its sovereign power of eminent domain, for purposes which are legally proper, has taken appropriate steps to condemn the fee simple title to the whole parcel of land, subject to a reservation. The defendants do not question the right of the United States to take the property. As a matter of fact, this purpose, which has been developed by [260] the Congress of the United States through legislation and through

the executive departments of the Government, is a valid one and has been determined by the governmental bodies of the United States to be a proper and essential purpose for the benefit of all the citizens of the United States, and, therefore, even if you are not a hunter or directly interested in the maintenance of the wildlife, you must remember that this is a declared policy of Congress and that the services, the wildlife services, have been built up for the purpose of conserving this wildlife, which is assumed to be in some way essential to the national wellbeing. That purpose is not before you for questioning. Nor should you consider, in that connection, whether or not you have always been impressed by the way in which the matter may have been administered, whether or not you like the administrative policies or agents of the Government. This action in condemnation has nothing to do with those considerations. You must simply accept, as does the Court, the declaration of Congress that this is an essential purpose and that it is necessary, according to the declaration of the agents of the Government, to acquire this land in order to carry out the purpose.

Now, in this connection, in connection with the case, I have this further to say, that the law places the power in a judge of the Federal Court to comment upon the situation as he finds it with regard to the facts. I have two duties. I [261] have the duty to lay down the rules of law, and those you are bound to follow, whether you agree with them or not. In another respect I have the duty, if certain facts strike me as necessary to clarify, that I should make those as clear as possible, and in that it becomes nec-

essary for me to comment on a question of fact. In that connection, of course, you are the sole and exclusive judges of the facts and you are not bound to follow the suggestions that I may make to you in regard to the facts. When I do comment on a question of fact I shall make it very clearly as distinguished from a rule of law. But I want you to carefully consider any comments that I make for the purpose of correctly deciding this litigation.

Now the Court will proceed to give you the rules of law. There is only one question which you are to determine in this case. The question which you are to determine is, what is the just compensation which should be paid by the United States to the defendants for the property which has been appropriated as of the 11th day of February, 1947? The Government is given the right, as a sovereign, to take the private property of any citizen for proper governmental purposes. As I have said before, that right is unquestioned. However, the constitution of the United States provides that when private property is taken for governmental purposes just compensation must be paid therefor. The just compensation for property, where the United States has taken the fee simple title, subject, [262] as in this instance, to reservations, consists in the fair market value of the particular piece of land, considering its highest and best use, within a reasonable period of time, and subject to the reservation, which in this instance is very important.

Now, I have used the term "fair market value." Fair market value of real property means the full

price at which the land can be sold on the open market, subject to the reservation, for cash, assuming an owner willing to sell and a purchaser willing and able to buy—in other words, the price that would be agreed upon by an owner who wished to sell but was not compelled by circumstances to sell and a purchaser who wanted to buy land but who was not forced to buy this particular tract. Fair market value is just as intelligible, therefore, to you as it is to the person who wrote the dictionary, but probably I can make it a little clearer by making certain exclusions.

Fair market value does not mean such a price as the property would bring at a forced sale, such as sheriff's sale or sale on mortgage foreclosure, because you can see that that is not an open market. It does not mean a sale such as would be made where an owner was compelled by imperative necessity to get cash immediately. On the other hand, fair market value does not mean a fanciful price such as the land might bring under extraordinary and peculiar circumstances, or [263] a value for the purpose of speculation, or a remote, imaginary or uncertain value based on what somebody might want to get for it, because no consideration should be given, in arriving at fair market value, to the willingness or unwillingness of the defendants to give up their property, and no consideration should be given to any peculiar or special value which a particular tract of land might have in the mind of one of its owners, unless that value were reflected in what will be paid for it on the open market for cash.

The determination of fair market value of a piece of land is based upon its description, its history, the type and fertility of the soil, its location with respect to markets and other facilities, together with every other factor or circumstance which in the opinion of a seller or buyer would be given weight in negotiations for sale as adding to or detracting from the value.

The owners on parting with their property are entitled to receive just such amount as they could obtain if they could go out on the open market and offer the property for sale, subject to the reservation which they have made. To give them more than this would be to give them more than market value. To give them less than that would be to deny them just compensation.

Now, the fair market value is a question addressed peculiarly to your sound judgments as persons of affairs. The [264] experience that you have had in the business world is of value, and you have a right to apply it to this situation. You yourselves saw this piece of land, and when you consider the situation, everything that you have heard in the testimony about it, you can make up your own minds, without the benefit of expert testimony even, what its value would be if it were sold on the open market for cash.

Now, as I have said at times before in other cases, the lake itself is one of the great factors in appraising this particular piece of land, as it is on other pieces on the lake,—and I say now that this is comment of fact. I will review, to a certain ex-

tent, some of the testimony in regard to this matter, but, as I say, you need not follow me in this part of the instructions, because this is not strictly a matter of law, although there are some considerations that I shall suggest to you for consideration. The lake itself makes all the value that there would be to this tract of land. If there were no water in this area, the land would have practically no value. The lands on the border, on other portions of Malheur Lake, which the water does not cover at various seasons of the year, are of little or no value. That, I think, is inherent in the testimony in this case. The thing that adds uncertainty to the value of this land is the uncertainty of how much the land is going to be covered in a year by the water, and, as you have been advised, the water fluctuates. One year [265] it comes on early and stays late, perhaps; another year it does not come on at all. The testimony regarding raising of grain here is indicative of exactly that situation. They can only raise grain when they can get the seed in in time, after the water has left the land, so that the grain can mature during the growing season of that year. If the water does not recede from the land in time they can't plant. If it recedes from the land too late they can't harvest it, because the grain won't mature. That is the reason, as you all know, why there have only been certain years that they have been able to plant grain.

Now, if the water stands on this land during the growing season it won't even grow stock feed while water is there. It grows tules, although if it does

not completely cover foxtail and some other grass that has gotten a start the foxtail will grow, and, according to the testimony here, will sometimes grow all winter, after the water recedes.

So in all of this situation you have to consider the situation of this lake and as a purchaser who was thinking of putting out cold cash for this piece of land you would have to consider very carefully how much crop and how much hay you could raise on this land in a given year and how much you were going to be affected by the fluctuations of the water.

Now, there is another factor in this situation in this particular case, and that is the reservation, which, as I [266] have said before, is extremely important. The allegation of the Second Amended Complaint, which is not denied, is the estate taken by plaintiff in this proceeding for the public use is the full fee simple title to the lands described, reserving the right to use in livestock ranching operations, such as harvesting of hay and feeding and grazing of stock, the surveyed land and Special Master Tract 48 in the bed of Malheur Lake for a period of five years from October 9, 1946, in accordance with rules and regulations of the Secretary of the Interior.

Now, that map which is in evidence, which you will have with you in your jury room, has the upland marked on it in the heavy black lines, and one of the witnesses marked in red the part of it that constitutes Special Master Tract No. 48, so you will know from looking at the map exactly what

lands it was that they have reserved for a period of five years for certain specific purposes which I have read to you.

Now, in appraising this land and fixing its fair market value you have to consider that reservation. Five years is quite a period of time, and you would have to consider, as a purchaser going onto the open market and laying down cash for this land, how much you would pay for it in view of that reservation, because you would be excluded for five years from the livestock feeding operations upon this particular piece of land, and that would add, in my opinion, a considerable factor [267] in setting the purchase price that a willing purchaser who did not have to buy this piece of land would pay for it.

Now, at that point I mark the close of any comment of fact upon the part of the Court, and, as you will remember, you do not have to follow me on the question of comments of fact, although it is the law that you must consider this reservation in fixing the fair market value of this particular piece of land.

The testimony which you have heard as to the conditions on a piece of land or its history, its production, anything of that sort, are facts and evidence as to facts. Such evidence is binding upon you and you must give it full weight, subject to the credibility which you give to a particular witness.

On the other hand, considerable testimony has been given by various witnesses relating to the opinions of the witnesses as to the fair market value of the property under consideration as experts. Several of the witnesses have given an opinion as to the

value of the particular land upon the market. Such opinions, whether given by an expert testifying for the United States or for the defendants, are not binding upon you as is the sworn evidence as to a fact. It is true that the Court permits certain persons who have made studies of market conditions affecting real property in a particular area and who have investigated, who have had experience which the rest of us have not had, with regard to values of land, to [268] give such opinions, but they are only advisory to you and you are not bound to follow them. As a matter of fact, you can discard them altogether and proceed upon your own notions and your own ideas of value, so long as you stay within the sworn evidence as to facts.

Now, you should carefully weigh these opinions, however, and determine the qualifications of the particular witness to speak and give an opinion, and when you have determined how much weight you wish to give his opinion you may follow it if you desire, but you are not bound to follow it. You may, instead, use your own best judgment, based upon the evidence, and set the fair market value of this particular piece of land, subject to the reservation.

Now, there is a factor that I want to call your attention to in that regard, that the experts who testified for the defendants in this case did not testify as to the particular thing that the Government is taking. They testified to the full market value of the fee simple title to this piece of land, without giving any consideration whatever to the value of this reservation, and so in considering those opinions

you have to take that into consideration, that they entirely disregarded a very important factor, which was the reservation that was attached to this property. The witnesses, on the other hand, who testified for the Government gave full weight to the reservation and testified to much more value than they [269] would have given in the event that the reservation had been left out.

With respect to the reservation, I also call your attention to another factor, and that is that the higher the value you place on this land the higher the value you have to place on the reservation, because a reservation that only affects a five-years use of a part of a \$10,000 piece of land is an entirely different value than one that affects a \$50,000 piece of land or a \$40,000 piece of land, whatever you may give; but those factors have to be coordinated in some respect.

Now, in the ultimate, when you bring in a verdict, of course, it will represent your composite advised opinion as to the fair market value of this particular tract of land, subject to the reservation. Your duty, and your sole duty, is to fix the just compensation to be paid by the United States to the owners because of the acquisition of this land, subject to the reservation.

I have before spoken of the question of a quotient verdict. It would be improper for you to each of you figure up your notion of the value of the land, subject to the reservation, and then take the twelve opinions and add them together and divide it by twelve. That is a quotient verdict and the Court

would be required to set that aside, so do not follow that procedure.

And, furthermore, do not balance up, strike a division [270] between what the Government's experts have testified to on the one hand and the experts of the defendants on the other. I have warned you before that the experts of the defendants did not testify to the same thing as the experts of the Government, so it would be entirely improper for you to try to strike any balance between them.

The thing for you to do is to take all of the evidence which you have in the case and the view of the premises and what you know of land values and sit down and argue it out and set a fair value on this land, subject to the reservation. It is a complicated problem in some respects, but, nevertheless, one that you can settle by threshing it out among yourselves and without following any mathematical processes.

And, of course, you have been chosen as fair and impartial people, you have all sworn that you would be fair and impartial. Try to act just as conscientiously as you can and not regard any extraneous influences, one way or the other, about this case. I am sure that I can trust you with a determination of the matter without any difficulty, and it is with entire confidence that I submit the matter to you.

You are the sole and exclusive judges of the facts in the case and the credibility of all the witnesses. The power of judging the effect or value of evidence, however, is not arbitrary, but must be exercised with legal discretion and [271] in subordination to the rules of evidence.

The direct evidence of one witness as to a fact to whom you give full credit and belief is sufficient to establish any issue of fact in this case.

You are not bound to find a verdict in conformity to the declarations of any number of witnesses which do not produce a conviction in your mind as against the testimony of a less number or against other evidence or an inference from evidence which does satisfy your minds.

Every witness is presumed to speak the truth. This presumption, however, may be overcome by the manner in which he testifies, the character of his testimony, the interest that he may have in the outcome of the case, or by evidence affecting his character or motives, or by contradictory evidence.

If you find that a witness has testified falsely in any one material part of his testimony you should look with distrust upon the other evidence given by such witness, and if you find that any witness has testified wilfully false you will be at liberty to entirely disregard all the evidence given by such witness, unless corroborated by other evidence which you do believe.

You will have with you in the jury room the exhibit which has been introduced in the case and one form of verdict, which, omitting the formal portions, I will read to you:

“We, the jury duly empanelled and sworn to try the [272] above-entitled cause, find the full, fair market value of the full fee simple title to the lands described in the Second Amended Complaint in condemnation and designated as Tract No. 17,

reserving the right to use in livestock ranching operations, such as harvesting of hay and feeding and grazing of stock, the surveyed land and Special Master Tract No. 48 in the bed of Malheur Lake, for a period of five years from October 9, 1946, in accordance with the rules and regulations of the Secretary of the Interior, and the just compensation to be paid for the taking of said lands, subject to said reservation, is the sum of \$.....”

In that blank space after the dollar sign you will fill in such amount as you find represents just compensation to be paid by the United States to these defendants for the taking of these lands, subject to the reservation.

“Dated at Burns, Oregon, thisday of September, 1947.”

.....,

“Foreman.”

Since this case is prosecuted in the Federal Court, ladies and gentlemen, you will have the verdict signed by your foreman alone, but it must represent the unanimous agreement of all of you as to the just compensation, therefore, before you return the verdict to court carefully check up to see that you are in agreement as to the amount that you fill in as just compensation.

Are there exceptions? [273]

Mr. Hicks: I assume they may be taken, your Honor, in the regular course?

The Court: Yes, I will give you the opportunity. Further matters? Swear the bailiffs.

(The bailiffs were thereupon duly sworn.)

The Court: You are excused, ladies and gentlemen, to deliberate on your verdict.

(The jury thereupon retired to consider their verdict.)

Mr. Hicks: May it please the Court, I want to note these exceptions:

Your Honor, I believe it was in the form of a comment, whether segregated or not I do not recall, but you did instruct the jury that with reference to those lands that are not touched by water or served by the ebb and flow of the lake such lands are of practically no, if indeed any, value. I simply point out, in that connection, that even the Government's own appraisers put a value of \$2 an acre on that land, and Mr. Howard, our own appraiser, put a value of \$10 an acre.

The Court: All those lands are touched by water. I am talking about lands of that type that are not touched by water, and what I said is true. I refuse to change it. You may have an exception.

Mr. Hicks: Then one other matter, your Honor, which was specifically a comment of fact: The Court pointed out to the jury the fluctuations of water elevations as a factor in [274] disparagement of the value of the land. I agree with your Honor that that is a factor. However, I think it likewise in fairness might have been pointed out to the jury that the ebb and flow of the water of the lake serves, too, as an automatic irrigating process which adds value, and favorably so, to the lands through the action of the water. I submit that as a fact that we all know that might have been balanced off.

The Court: Well, that is the point that I said in the other part of it, to which you have already taken exception. I said it had no value unless there was water.

Mr. Hicks: Well, I personally do not see any inconsistency in my position.

The Court: I don't see any inconsistency in my instruction. I think it balanced both sides of it.

Mr. Hicks: Maybe I misapprehended it. Your Honor, in commenting, said that their valuations were placed without taking into consideration the reservation, which, of course, was true, and said that had that reservation been taken into consideration the values should have been much larger. Now, if the record shows—I believe only one witness did place a value on a rental basis for a five-year period, a reasonable rental basis, and that valuation that he put on there was some nine hundred plus dollars. Now, the only evidence specifically on that phase of the case is the item of nine hundred dollars, and it occurred to me that the jury, under your Honor's instruction, when you said it would be much less, when the evidence is here that it is nine hundred and something, something under a thousand dollars, for five years——

The Court: Well, I didn't agree with the appraisers myself. I don't agree with them. I think a five-year reservation on a piece of property is of considerably more value than less than a tenth of the fee title. As a matter of fact, appraisers, normally speaking, appraise the full fee value as twenty years, and I have pointed out in some of my opin-

ions. In *In re Beeman* I pointed out the fact that the fee value is eaten up in twenty years, and, therefore, I do not agree with them, although I did not specifically comment to that effect, and in as much as your testimony was not entitled to admission at all I thought I was very lenient about commenting on it.

Mr. Hicks: May we have the exceptions?

The Court: Yes. Further matters? Court is in recess.

(A recess was thereupon had, and at 9:45 o'clock p. m. a verdict was returned by the jury and read in open court.)

The Court: Is this your verdict, ladies and gentlemen of the jury?

The Jury: Yes, sir.

The Court: The verdict will be received and filed and judgment entered thereon.

Ladies and gentlemen, the Court thanks you for the attention you have given this case and discharges you from [276] further consideration thereof. The Court also discharges you from further attendance on the court at this time until you are further notified. You are now excused.)

(The jury was thereupon excused.)

The Court: Court is now in adjournment until tomorrow morning at 9:00 o'clock.

(Whereupon, at 9:50 o'clock p.m., Thursday, September 25, 1947, court adjourned to 9:00 o'clock a.m., Friday, September 26, 1947.)

Saturday, September 27, 1947, further proceedings herein were had as follows:

The Court: The Court suggests that further consideration will be given to the case which was tried the other day, the last verdict of the jury, in the Hayes case, in the question of the validity of the Declaration of Taking.

Mr. Boylan: That will be taken up, I assume, in Portland?

The Court: The Court is reserving that, of its own motion, at the present time. [278]

Monday, October 20, 1947, at Portland, Oregon, proceedings herein in re motion to set aside verdict of the jury were had as follows:

Appearances:

Mr. Bert C. Boylan, Special Assistant to the United States Attorney, appearing for plaintiff;

Mr. Edwin D. Hicks, of attorneys for defendants Hayes.

(The motion was argued at length by respective counsel, following which the following occurred:)

The Court: Well, I have tried to arrange this with you gentlemen, but you bring it up on a strict legal basis, and if you leave it that way I am going to rule on a strict legal basis. You have got your heads set, apparently, on the thing. I know the answer all the way through this case and I am going to give it to you. Now, if there is going to be no yielding on either side of this case, then you will have to take it as it is. I take it that is what you want done.

Mr. Hicks: I am not sure I know what your Honor is driving at.

The Court: No, I know you don't know what answer I have in mind, but I assure you I have one. Now, I have talked to you both about this case and I told you what you had better do and you haven't done it, so if you want to put it on a strict legal basis now you are going to take a strict legal [279] result, if that is the way you want to submit it.

Mr. Hicks: I believe we have no alternative, your Honor, so far as I know.

The Court: Well, all right,—I take it the Government feels the same way, so here is the answer.

The verdict was, in the opinion of the Court, excessive. I think that the jury did not give proper value to the reservation. The reservation of five years without rental upon that land, in my opinion, is worth a great deal more than the Court believes the jury gave to it. As I view the jury's verdict, they took Howard's figure, which was on the basis of forty thousand dollars for the fee simple title, and appraised the reservation at four thousand, and I think that is an improper result, and I, in the instructions, very carefully cautioned them to give value to that reservation but they didn't do it, so I take it that they did not follow the instructions. It is true they did not have to, but they are supposed to pay more attention to what I say than what they did, and as a result of it the verdict can't stand.

There is another reason why the verdict can't stand. The Court was in error in not allowing the Government to show what the contract was. If the

jury had found that these people had agreed to the value that they did on that contract, I am quite sure that they would not have returned the verdict that they did. So that is an additional ground why this verdict can't stand. [280]

On the other hand, the contract itself was negotiated in a way which makes me believe that the Hayeses didn't know what was in the contract. The testimony of Hayes, given on the witness stand, indicated to me that he had very carefully worked out a reservation that he desired and he expected to get. That reservation was that he should have this land free for five years, at the end of that time that he should have an option to lease it at a price to be agreed upon under the rules and regulations laid down by the Secretary of the Interior, and that when that time had elapsed he had another option. Now, those options, in my opinion, are of great value, even with the reservation that the Secretary of the Interior could lay down rules upon which the value of the lease would be computed, or the value of the rental. Besides that, I don't think that they knew that they were comprising the damage claim they had against the Government. Now, that is the Government's own mistake. It was not upon the ground at all that it was entirely unethical from the standpoint of the lawyers, although it was entirely unethical to deal with those people in that way, and it certainly was unethical to write into the contract things that they did not agree to and stipulations entirely contrary to what their agreement was. I have no doubt that Mr. Hayes' testimony was cor-

rect and that that is what he stipulated for and that is what he [281] thought he was getting. If he had had a lawyer there, he would have known he wasn't getting it, and I do not palliate or defend for a single moment the conduct of the Government in entering into a contract under those circumstances. That is why I set it aside, and I still stand in that position.

Now, I think the agents of the Government, though, should not be bound by the Declaration of Taking that was entered into under those circumstances. I think they thought they were pretty cute all right and that they were going to consummate and obtain the fruits of their fraud. I have decided they can't do that,—in other words, they can't enforce the contract—but, on the other hand, I don't think the Government is bound by the Declaration of Taking that was entered, to which the contract was a condition precedent, and I don't think that the Government can be estopped by the filing of a Declaration of Taking under those circumstances,—that the Government would have a right to withdraw. True, the Government is not withdrawing, because they think they can enforce that contract. I don't think any court in the country would allow them to enforce that contract. Therefore, I don't think they would be bound by the Declaration of Taking. As a result of that, I strike the Declaration of Taking from the files and dismiss the cause.

Mr. Hicks: Could I make one observation, your Honor? [282]

The Court: Yes.

Mr. Hicks: The Court will recall that even after your Honor had held that the contract was not valid we indicated, I believe on the record, our consent to the government that if it wanted to strike the Declaration of Taking and put the Hayeses in the same status that the other people were in after those other cases had been tried out there, so the Hayeses could keep the land and the Government could keep its money, that that was agreeable with us, and counsel informed me that he had communicated with the Attorney-General and even then the Attorney-General would not authorize him to strike the Declaration of Taking, and so no motion was made by him, although it was invited by the Court, to move to strike that Declaration of Taking,—he refused to do it even after your Honor set aside the contract; they chose to go to the jury and have them set a valuation on the land and let the Declaration of Taking stand. That is the history of it, and Mr. Boylan will confirm me on that. That is the exact status of it.

The Court: Yes.

Mr. Hicks: And, with regard to the other point about the jury not being permitted to know about the contract and all, your Honor will recall that we urged upon the Court the proposition that the jury should have that whole question on the contract and that we should be permitted to show the circumstances under which it was entered into, and they were [283] going to show the contract as such, but it was on the application of counsel that they urged upon the Court that that question was one for the

Court and not for the jury, so if there was error there the gentlemen certainly invited it. Now, that is the true history of it.

The Court: Yes, but you weren't so lily-white either. I asked you on the morning that this case was tried if you would not agree to that proposition, so they could submit it to Washington. You told me you would not.

Mr. Hicks: You mean about striking the Declaration?

The Court: Yes.

Mr. Hicks: Now, I might be in error, your Honor, that even after you set the contract aside Mr. Boylan did communicate with Washington to find out whether the Declaration might be stricken, in order that the Hayeses might be put in the same position as Rose Otley and Henry Otley and the others there, and, if my memory serves me, we were willing to do that very thing.

The Court: Well, you didn't tell me you were willing. I asked you that question that morning and you said you thought you had some doubts about it.

Mr. Hicks: Yes, I remember that.

The Court: My memory isn't so wrong about that.

Mr. Hicks: I might be wrong about that. Now, I did consult with them and I told Mr. Boylan—I might be wrong [284] about this—to find out whether they would consent to have the Declaration withdrawn, because our people didn't want the Government to have the land, they wanted to be put in the position of the other people.

The Court: All right, if you are satisfied.

Mr. Hicks: Now, we have gone ahead and had a jury trial, and the fact is, I think, your Honor, that the morning after the Court held the contract to be invalid Mr. Boylan talked to the Attorney-General at that time to find out whether they would permit him to move for a dismissal on the Declaration of Taking and they wouldn't give him that authority. I thought the trial would have been avoided if he could have gotten permission from the Department of Justice to dismiss that, and I thought we had kept your Honor fully advised of our position in that regard. Mr. Boylan doesn't gainsay a thing I have said.

The Court: Oh, no. I have heard your argument on the matter. I have ruled now. I told you what would happen if you were going to take a chance on it. My memory is good as to what conversation took place, and so I don't think anybody is in a position to question the ruling. You are perfectly at liberty to appeal it, on both sides. I am perfectly satisfied. If you can get anybody to accept a different view, that is fine with me.

Mr. Boylan: If the Court please, might we have an exception [285] to that portion of the Court's ruling wherein it rules that the Declaration of Taking be stricken?

The Court: Sure, you can have an exception to all of it, on both sides.

Mr. Hicks: Yes, we may have exceptions throughout to your Honor's adverse rulings with

respect to the verdict and the judgment and its validity, and so on.

The Court: I think I must be right, now, because I am in the middle of the road. [286]

[Title of District Court and Cause.]

Certificate

I, Cloyd D. Rauch, a Court Reporter of the above-entitled Court, duly appointed and qualified, do hereby certify that I reported in shorthand the testimony and proceedings had at the trial of the above cause and at certain subsequent dates, that I subsequently caused my said shorthand notes to be reduced to typewriting, and that the foregoing transcript, pages 1 to 286, both inclusive, constitutes a full, true and accurate transcript of said testimony and proceedings, so taken by me in shorthand as aforesaid, and of the whole thereof.

Dated this 11th day of March, A.D. 1948.

CLOYD D. RAUCH,
Court Reporter.

[Endorsed]: No. 11900. United States Circuit Court of Appeals for the Ninth Circuit. United States of America, Appellant, vs. Marcellus B. Hayes and Mary I. Hayes, also known as Bell Hayes, husband and wife; Adelbert M. Hayes, and Harney County, a Municipal corporation and political subdivision of the State of Oregon, Appellees, and Marcellus B. Hayes and Mary I. Hayes, also known as Bell Hayes, husband and wife; and Adelbert M. Hayes, Appellants, vs. United States of America, Appellee. Transcript of Record. Upon Appeals from the District Court of the United States for the District of Oregon.

Filed April 16, 1948.

/s/ PAUL P. OBRIEN,

Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

In the United States Circuit Court of Appeals
for the Ninth Circuit

No. 11900

UNITED STATES OF AMERICA

Appellant,

vs.

MARCELLUS B. HAYES and Wife, MARY I.
HAYES, and ADELBERT M. HAYES,
Appellees.

STATEMENT OF POINTS AND
DESIGNATION OF RECORD FOR PRINTING

The United States of America, appellant in the above-entitled proceeding, adopts and will urge as its points on appeal the statement of points appearing in the transcript of record on file herein; and .

Appellant designates, for printing, the entire certified transcript of record on file herein.

Dated at Washington, D. C., this.....day of July, 1948.

A. DeVITT VANECH,
Assistant Attorney General.

[Endorsed]: Filed July 6, 1948.

[Title of Circuit of Appeals and Cause.]

STATEMENT OF POINTS TO BE RELIED
UPON BY CROSS-APPELLANTS

Marcellus B. Hayes and Mary I. Hayes, also known as Bell Hayes, and Adelbert M. Hayes, defendants and cross-appellants herein, and each of them, hereby adopt the Statement of Points upon which the said defendants and cross-appellants intend to rely on appeal that was filed in the District Court of the United States for the District of Oregon as the points upon which they intend to rely for appeal in the Circuit Court of Appeals of the United States for the Ninth Circuit.

Dated this 28th day of June, 1948.

HICKS, DAVIS & TONGUE,
J. W. McCULLOCH,
Attorneys for Cross-
Appellants.

Due and legal service of the within Statement of Points to be Relied Upon by Cross-Appellants by receipt of a duly certified copy thereof, as required by law, is hereby accepted in Multnomah County, Oregon, on this 7th day of July, 1948.

LINUS M. FULLER,
Of Attorneys for Plaintiff.

[Endorsed]: Filed July 8, 1948.

[Title of Circuit Court of Appeals and Cause.]

DESIGNATION BY CROSS-APPELLANTS OF
CONTENTS OF RECORD ON APPEAL

Come now Marcellus B. Hayes and Mary I. Hayes, also known as Bell Hayes, and Adelbert M. Hayes, as defendants and cross-appellants herein, pursuant to Rule 75, Federal Rules of Civil Procedure, and designate the same portions of the record to be contained in the record on appeal to the United States Circuit Court of Appeals for the Ninth Circuit in the above-entitled cause as heretofore designated by the United States of America, the appellant herein.

Dated this 28th day of June, 1948.

HICKS, DAVIS & TONGUE,
J. W. McCULLOCH,

Attorneys for Defendants and
Cross-Appellants.

Due and legal service of the within Designation by Cross-Appellants of Contents of Record on Appeal by receipt of a duly certified copy thereof, as required by law, is hereby accepted in Multnomah County, Oregon, on this 7th day of July, 1948.

LINUS M. FULLER,
Of Attorneys for Plaintiff.

[Endorsed]: Filed July 8, 1948.